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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1931

CERTIORARI GRANTED MAY 25, 1931

(35,818)

No. 6226

United States

Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellant,

vs.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

(35,818)

SUPREME COURT OF THE UNITED STATES

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SOUTHERN PACIFIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorneys for Defendant and Appellant.

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 2348–K.—IN EQUITY.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT FOR INJUNCTION.

By leave of Court first had and obtained, plaintiff above named files this its amended complaint

against the defendant above named and for cause of action alleges:

I.

That Western Pacific California Railroad Company, plaintiff herein, is, and ever since the 10th day of July, 1928, has been continuously, a railroad corporation organized and existing under the laws of, and is a citizen and resident of, the State of California, having for one of its purposes, the construction and operation of a standard guage line of railroad commencing in the City and County of San Francisco, State of California, at a point in the vicinity of Islais Creek, and extending thence in a general southerly direction through said City and County of San Francisco, to, into and through San Mateo County, California, to and beyond Redwood City, San Mateo County, California. The purpose of building said railroad is to enable plaintiff to carry freight and other classes of traffic, as need arises, thereon for hire as a common carrier over and along said railroad from and to points on the [1*] line of said road between said termini; plaintiff has not as yet engaged in the construction of said railroad, pending the authorization of such construction by the Interstate Commerce Commission of the United States, but has diligently prosecuted its application for authorization to construct said railroad before said Commission, said proceeding, which is now pending, being numbered Finance Docket No. 7025. A hearing upon said application was held at San Francisco, California, by

*Page-number appearing at the foot of page of original certified Transcript of Record.

the Interstate Commerce Commission in January, 1929, and the matter is now pending before said Commission; in the application filed with said Commission for authorization of the construction of said railroad, the southern terminus is a point near Redwood City, San Mateo County, California, and the northern terminus is the City and County of San Francisco, California, at a point of connection with railroad of the Western Pacific Railroad Company. The general route of said railroad through said counties of San Francisco and San Mateo lies, for 22 miles, along and in the vicinity of the westerly shore of the Bay of San Francisco.

II.

That the defendant Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and a resident and citizen of said state. That said Southern Pacific Company is the owner or lessee of, and in possession of, and operating a railroad system which extends from the State of California into some seven or more other states of the United States and into the Republic of Mexico and which is used and operated by said Southern Pacific Company in the capacity of a common carrier for the purposes of transporting persons and property, in intrastate, interstate, and foreign commerce. That as a part [2] of said system and for the purposes and uses thereof as just set out, said Southern Pacific Company is and for many years last past has been the owner or lessee of and in possession of and operating a railroad from the City of San Francisco

southerly to and through Redwood City and passing through the City of San Mateo. That the location of the plaintiff's railroad between the City of South San Francisco, just southerly of said City of San Francisco, and said Redwood City is a short distance easterly of and approximately parallel with said railroad of the Southern Pacific Company. That between said two railroads lies the state highway known as the Bay Shore Highway, which has been definitely located from said City of South San Francisco to said Redwood City and which has been actually constructed as far southerly as the City of San Mateo.

III.

That on the 11th day of July, 1928, plaintiff's Board of Directors, in meeting regularly convened and held, duly adopted a resolution authorizing and directing the proper officers of the plaintiff to apply to said Interstate Commerce Commission for authorization to construct, maintain and operate its said railroad between the City of San Francisco and Redwood City. Pursuant thereto application was filed with said Interstate Commerce Commission as hereinbefore alleged. That during the months of August, September and October, 1928, the plaintiff proceeded diligently to survey and definitely locate its said line of railroad along the route of said projected location and that thereafter the plaintiff's board of directors approved and adopted the definite location of said proposed line of railroad. That the defendant Southern Pacific Company intervened before said Interstate Commerce

Commission in the matter of said application in opposition thereto, [3] that said application was heard in said City of San Francisco in January, 1929, and at said hearing the defendant appeared and opposed the granting of said application, and in the person of its representatives was present throughout. That at said hearing testimony was introduced by the plaintiff showing the definite location of the plaintiff's proposed railroad and in particular that the same through the City of San Mateo paralleled the adopted location and right of way of the State Highway known as the Bay Shore Highway and lay to the east thereof and between said highway and the Bay of San Francisco and the defendant Southern Pacific Company became and ever since has been cognizant of the exact location of plaintiff's said railroad and in particular of its location through the City of San Mateo and of the fact that it intersects the southerly limits of said City of San Mateo at a point approximately eight hundred feet easterly from the intersection of the right of way of said Bay Shore Highway with said city limits.

IV.

That said Southern Pacific Company, on Saturday, the 23d day of March, 1929, and very close to the noon hour, commenced the construction of a railroad track directly across the location and route of the plaintiff's said railroad at a point within said City of San Mateo and close to its southerly city limits and during the balance of that day and the following Sunday proceeded vigorously with such

construction and by the following Monday morning had laid such track directly across the location and route of the plaintiff's said railroad and across said state highway and for some little distance on each side thereof. That said track as laid had no connection with the railroad of the Southern Pacific Company but commenced at a point about twenty-five hundred (2500) [4] feet easterly of said railroad and close to the location of said highway and extended easterly across said location and across the location of the railroad of the plaintiff.

V.

That since the construction of said track across the location of the railroad of the plaintiff as aforesaid, the Southern Pacific Company has proceeded with the work of extending the same, both easterly and westerly, and more particularly westerly to a connection with the railroad of the Southern Pacific. That as plaintiff is informed and believes and therefore alleges, it is the purpose and intention of the Southern Pacific Company to connect said track at its westerly end with said railroad of the Southern Pacific Company and at the easterly end to extend the same northerly and southerly and approximately parallel with the railroad of the plaintiff. That said track was not built across said railroad of the plaintiff nor will the same be extended as aforesaid for the purpose of serving any existing industry or settlement or meeting any existing demand for railroad service. That the territory into which said track will extend, that is, the territory easterly of the plaintiff's railroad and between it and the Bay

of San Francisco and extending from said city of South San Francisco to Redwood City is almost entirely unoccupied and undeveloped and has at present no industry or settlement or anything requiring railroad service now or in the immediate future. That one of the objects of the proposed railroad of the plaintiff, as known to the Southern Pacific Company, was to afford railroad facilities to such territory as it was developed and occupied by industries and settlements and by affording such facilities to assist in and bring about its occupation and development by industries and settlements requiring railroad service. That, as the plaintiff [5] is informed and believes and therefore alleges, the purposes of the defendant Southern Pacific Company in building said track and extending the same, are solely to annoy, harrass, impede and, if possible, prevent the construction and operation by the plaintiff of its said proposed railroad by impeding and, if possible, preventing the construction and operation of the same across said track and by extending its said railroad by means of said track in advance of the railroad of the plaintiff into the territory above referred to lying between the plaintiff's proposed railroad as located and the Bay of San Francisco.

VI.

That the location by the plaintiff of its proposed railroad and likewise the location of said Bay Shore Highway were and are prior in time and in right to the location of said track by the Southern Pacific Company, and no permission to cross either said

railroad or said highway with said track at grade has been secured from the Railroad Commission of the State of California as provided by Section 43 of the Public Utility Act of said state nor has any application for such permission been made to said Commission.

That said track is not a spur, industrial, team, switching or side track but is a track whose purpose and effect is to extend the railroad of the Southern Pacific Company into new territory not heretofore served by it, to wit, the territory or section hereinabove referred to and lying between the line of the proposed railroad of the plaintiff and the Bay of San Francisco and such track will, when completed as the Southern Pacific Company intends to complete it, be an extension of said railroad of the Southern Pacific Company into such territory. That the construction of said track was undertaken and has been prosecuted without there first [6] having been obtained from the Interstate Commerce Commission of the United States a certificate that the present or future public convenience and necessity require or will require the contruction thereof and without application being made to said Commission for such certificate.

VII.

That unless the Southern Pacific Company is enjoined therefrom it will continue the construction of said track and the extension of the said railroad as aforesaid and thereafter begin and continue the operation of the same. That the maintenance and operation of said track across the railroad of the

plaintiff will seriously impede and render more expensive, difficult and hazardous the construction of the plaintiff's railroad and its operation after completion. That pecuniary compensation will not afford adequate relief to the plaintiff for the injury that will be so done it and it will be exceedingly difficult to ascertain the amount of compensation which would afford adequate relief for such injury.

That the maintenance and operation of said extension of the railroad of the Southern Pacific Company in the said new territory will destroy in substantial measure the value of said railroad of the plaintiff, decrease the business and revenue of said railroad and impede and render more difficult and expensive the rendition by it of railroad service and facilities in said territory. That pecuniary compensation will not afford adequate relief to the plaintiff for the injury that will be so done it and it will be exceedingly difficult to ascertain the amount of compensation which would afford adequate relief for such injury.

That said track at present consists of rails and ties laid on the natural surface of the ground without grading or ballast and without being attached to or imbedded in the ground [7] and capable of easy removal. That unless restrained therefrom the Southern Pacific Company will proceed forthwith to grade and ballast said track, imbed the same in the ground and make the same difficult of removal and in every way make more difficult and expensive the construction by the plaintiff of its railroad at that point.

WHEREFORE, the plaintiff prays for the judgment of this Court permanently enjoining the defendant, its officers, agents and employees, from

1. Maintaining or operating said track across the said railroad of the plaintiff until permission has been obtained by the defendant from the Railroad Commission of the State of California or other public authority having jurisdiction in the premises to maintain and operate said track at grade across the railroad of the plaintiff.

2. Constructing, maintaining or operating any railroad track connecting with said railroad of the defendant and extending into the said territory lying easterly of the railroad of the plaintiff and between it and the Bay of San Francisco and between the cities of South San Francisco and Redwood City, until there has been obtained from the Interstate Commerce Commission of the United States its certificate that the present or future public convenience and necessity require or will require the construction of such extension.

The plaintiff further prays that pending the final determination of this action the defendant be enjoined from further extending said track and from grading or ballasting the same or imbedding it in the ground or doing anything whatsoever designed to or the effect of which would be to render said track less capable of removal or make more difficult or [8] expensive the construction by the plaintiff of its proposed railroad at or near the point where the location of said railroad is crossed by said track.

The plaintiff further prays for such other and further relief as may be meet and adequate in the premises and for costs of suit.

F. M. ANGELLOTTI,
A. S. HUTCHINSON,
WARREN OLNEY, Jr.,
Attorneys for Plaintiff.

United States of America,
State of California,
City and County of San Francisco,—ss.

H. M. Adams, being first duly sworn on oath, deposes and says:

That he is an officer, to wit, the president of Western Pacific California Railroad Company, the plaintiff in the within-entitled action, and makes this verification on behalf of said plaintiff; that he has read the foregoing amended complaint for injunction and knows the contents thereof and that the same is true of his own knowledge except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

H. M. ADAMS.

Subscribed and sworn to before me this 5th day of April, 1929.

[Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within and receipt of a copy is hereby admitted this 5th day of April, 1929.

H. C. BOOTH.
C. W. DURBROW.

[Endorsed]: Filed April 5, 1929. [9]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

Now comes the defendant, Southern Pacific Company, a corporation, and answering the amended complaint as entitled above, denies and avers as follows:

I.

Answering Paragraph I of plaintiff's amended complaint defendant admits the allegations thereof, but states that the application referred to therein was made by plaintiff to the Interstate Commerce Commission under the provisions of Paragraphs 18 to 21, inclusive, of Section 1 of the Act to Regulate Commerce, as amended, and that the proceeding referred to in said paragraph has never been determined or decided by said Commission, and that said plaintiff has now no legal authority or right, and may never have any legal authority or right to construct the railroad referred to in said Paragraph 1, and that plaintiff has never constructed the same or any part thereof.

II.

Answering Paragraph II of plaintiff's amended

complaint defendant admits that it is a corporation organized and existing under and by virtue of laws of the State of Kentucky and is a resident and citizen of said state. [10]

Defendant denies that it is the owner but admits that it is the lessee of and in possession of and operating a railroad system within the states of California, Oregon, Nevada, Utah, Arizona and New Mexico, and that said road is used and operated by said defendant in the capacity of a common carrier for the purpose of transporting persons and property in interstate and foreign commerce, defendant denies that as a part of said system and for the purposes and uses thereof, it is, or for many years last past, or for any time, or at all, has been, the owner of any railroad extending from said City of San Francisco southerly to and through Redwood City, and passing through the City of San Mateo, but avers that said railroad is owned by Southern Pacific Railroad Company, a corporation, organized, existing and consolidated under the laws of the States of California, Arizona and New Mexico, and that defendant has leased said railroad from said Southern Pacific Railroad Company, and is in possession of said railroad, and is operating the same.

Defendant admits that the proposed location of plaintiff's railroad between the City of South San Francisco and said Redwood City is a short distance easterly of and approximately parallel with said railroad operated by defendant.

Defendant admits that the state highway known

as the Bay Shore highway lies between defendant's railroad and the proposed location of plaintiff's railroad as far southerly as Fifth Avenue in said City of San Mateo and that said Highway has been actually constructed as far southerly as said Fifth Avenue but defendant is without knowledge that said highway has been definitely located from said City of South San Francisco to said Redwood City southerly of said Fifth Street in said City of San Mateo, and therefore denies the allegations with respect thereto.

III.

Answering Paragraph III of plaintiff's amended complaint defendant admits that on the 11th day of July, 1928, plaintiff's Board of Directors in meeting regularly convened and held adopted a resolution [11] authorizing and directing the officers of plaintiff to apply to the Interstate Commerce Commission for authorization to construct, maintain and operate said railroad between said City of San Mateo and said City of Redwood City; that pursuant thereto application was filed with said Interstate Commerce Commission.

Defendant denies that during the months of August, September or October, 1928, or at any other time or at all plaintiff proceeded diligently or otherwise to survey and definitely locate its said line of railroad along the route of said project location or that thereafter or at any time or at all plaintiff's Board of Directors approved or adopted the definite location of said proposed line of railroad. In this behalf defendant alleges that upon the days

specified plaintiff's Board of Directors adopted a resolution purporting to locate said line of railroad and determining the route thereof which said resolution was in words and figures as follows in so far as said resolution relates to a location of a line of railroad:

> "WHEREAS, It is desired by this company to construct, maintain and operate a line of railroad commencing at a point in the City and county of San Francisco, State of California, in Quint Street in the vicinity of Islais Creek, and extending thence in a general southeasterly direction in said City and County of San Francisco, approximately 1.0 mile; thence in a general southerly and southeasterly direction approximately 22 miles through said City and County of San Francisco and the County of San Mateo, California, in the vicinity of the westerly shore of the Bay of San Francisco to Redwood City in said San Mateo County; thence in a general and northeasterly direction approximately 2.0 miles to a point at or near the plant of the Pacific Portland Cement Company in said San Mateo County; being a total of approximately 25 miles of new line of railroad"; [12]

Defendant admits that it intervened before said Interstate Commerce Commission in the matter of said application in opposition thereto and that said application was heard at the place and time specified by plaintiff in its said complaint and that at said hearing defendant appeared and opposed the

granting of said application and that in the person of its representatives was present throughout.

Defendant denies that at said hearing testimony was introduced by plaintiff showing any definite location of plaintiff's proposed railroad or in particular that the same through the City of San Mateo paralleled the adopted location or right of way of the State Highway known as the Bay Shore Highway, or lay to the east thereof or between said or any located highway and the Bay of San Francisco or that defendant became or ever since has been cognizant of the exact location of plaintiff's said railroad or in particular of its location through said City of San Mateo or of the fact that it intersects the southerly limits of the said City of San Mateo at a point approximately 800 feet easterly from the intersection of the right of way of said Bay Shore Highway within said city limits, and in this behalf defendant is informed and believes and therefore avers that there is no adopted location and avers that there is no right of way of the said highway known as the Bay Shore Highway through said City of San Mateo, southerly of said Fifth Avenue, and that said testimony introduced by plaintiff related only to a general or approximate location of plaintiff's proposed railroad between the points specified in Paragraph III of plaintiff's complaint.

IV.

Answering Paragraph IV of plaintiff's amended complaint defendant admits that on the day and at the time specified therein it commenced the con-

struction of a railroad track directly across the approximate proposed location and route of plaintiff's proposed railroad at a point within said City of San Mateo and close to its southerly city limits and that during [13] the balance of *said and* the following day proceeded vigorously with said construction and by the following Monday morning had laid said track directly across the approximate proposed location and route of plaintiff's said railroad, but denies that defendant at the time specified in plaintiff's amended complaint or at any other time or at all has laid said track across said state highway or any other highway or for some little or any distance on each or any side thereof.

Defendant admits that said track as laid at the present time has no connection with its said railroad and that said track commenced at a point approximately 2,500 feet easterly of its said railroad and extended easterly across the approximate proposed location of the railroad of plaintiff, but denies that said track was laid close to or at any other distance from the location of said highway or extending easterly across said location, and in this behalf defendant avers that it is without knowledge that there is now or ever has been any location of said highway at any of the points specified in Paragraph IV of plaintiff's amended complaint and therefore denies the same, and defendant avers that defendant also at the time it began laying and constructing said track began constructing and at the time the restraining order herein was issued had laid ap-

proximately 100 feet of track extending from a point approximately 75 feet from its main line and thence in a general southerly and easterly direction.

Defendant avers that had it not been restrained and thereby prevented from so doing it would have completed and that unless the injunctive relief herein sought by plaintiff is granted defendant intends to complete and will complete the construction of a spur or industrial track from a point on defendant's said line of railroad in said City of San Mateo along and upon land lying wholly within said city owned by defendant's said lessor, Southern Pacific Railroad [14] Company which will be used for the exclusive purpose of switching carload freight to and from such industries as may hereafter be located along said proposed industrial or spur-track and which may have carload freights for switching.

V.

Answering Paragraph V of plaintiff's amended complaint defendant admits that since the construction of said track across the approximate proposed location of the railroad of the plaintiff as alleged in plaintiff's amended complaint defendant has until restrained by the order entered herein proceeded with the work of extending the same both easterly and westerly and more particularly westerly to a connection with defendant's said railroad.

Defendant admits that it is the purpose and intention of defendant to connect said track at its westerly end with its said railroad but denies that

it is its purpose or intention at the easterly end thereof to extend the same northerly and southerly but admits that it is its purpose to extend the same easterly and northerly a distance of approximately 8,200 feet from the connection with its said main line as is more fully shown and delineated upon the map attached hereto marked Exhibit "A" and prayed to be made a part hereof, but denies it intends to extend the same approximately or at all parallel with the railroad of the plaintiff, and in this behalf defendant avers that plaintiff has not definitely located any line of railroad and that plaintiff has not acquired any right of way along or across which defendant has constructed or intends to construct any track complained of, and that plaintiff has never had any railroad of any kind, character or description.

Defendant admits that said track was not built across any railroad of the plaintiff, and in this behalf defendant alleges that plaintiff has no railroad, and admits that said track will not be extended for the purpose of serving any existing industry or settlement, but denies that said track will not be extended to [15] serve any existing demand for railroad service, and admits that the territory easterly of the plaintiff's proposed railroad and between it and the Bay of San Francisco and extending from said City of South San Francisco to Redwood City is almost entirely unoccupied and undeveloped and has at present no industry or settlement or anything requiring railroad service now or in the immediate future, but de-

fendant avers that the area which will be served by defendant's said industrial or spur-track requires railroad facilities not only in the immediate future but at the present time, and that ever since the month of September, 1925, and at divers other times since said date, to and including the present time, defendant has made repeated efforts to complete an industrial or spur-track connecting with its said line of railroad for the purpose of affording such facilities to assist in and bring about the occupation and development of lands wholly within said City of San Mateo suitable for industrial sites and locations adjacent, contiguous and tributary to and in the immediate vicinity of defendant's said line of railroad requiring railroad service.

Defendant is without knowledge that one of the objects of the proposed railroad of the plaintiff was to afford facilities to said territory easterly of plaintiff's proposed railroad and between said railroad and the Bay of San Francisco extending from the said City of South San Francisco to Redwood City as it was developed or occupied by industries and settlements requiring railroad services, and therefore denies the allegations with respect thereto and in this behalf, defendant avers that one of the objects of the proposed railroad of plaintiff is to invade and occupy territory already fully and efficiently and adequately served by defendant and to appropriate to itself the traffic heretofore transported by defendant over its said lines, and the revenues derived therefrom.

Defendant denies that the purpose of defendant in building [16] said track or extending the same

are solely or at all to annoy, harrass, impede or if possible or at all to prevent the construction or operation by the plaintiff of its said proposed railroad by impeding or if possible or at all preventing the construction or operation of the same across any track or tracks or by extending its said railroad by means of said track or otherwise in advance of the railroad of plaintiff in said territory specified in Paragraph V of plaintiff's complaint or otherwise or at all.

VI.

Answering Paragraph VI of plaintiff's amended complaint defendant denies that any location by plaintiff of its proposed railroad or the location of said Bay Shore Highway were and are prior in time or in right to the location of said track by said defendant.

Defendant admits that no permission to cross any railroad or any highway with its said track at grade has been secured from the Railroad Commission of the State of California as provided by Section 43 of the Public Utilities Act of said state and that no application for such permission has been made to said commission and in this behalf defendant avers that plaintiff never has had any railroad and that defendant's track does not cross any railroad or any highway, and in this behalf defendant avers that it is not required to make such application by Section 43 of the Public Utilities Act or any other section thereof.

Defendant denies that said track is not a spur, industrial, team, switching or side-track or that the purpose or effect of said track is to extend the

railroad of defendant into new territory not heretofore served by defendant or into the territory or section herein referred to in Paragraph VI of plaintiff's complaint, or that said track when completed, as defendant intends to complete it will at all be an extension of its said railroad into said [17] territory or any other territory or at all.

Defendant admits that the construction of said track was undertaken and has been prosecuted without there first having been obtained from the Interstate Commerce Commission of the United States a certificate that the present or future public convenience and necessity requires or will require the construction thereof or without application being made to said commission for such certificate, and in this behalf defendant avers that it is not obliged to obtain such certificate from said Interstate Commerce Commission and that no such certificate is required by said Interstate Commerce Act or any other act, and in this behalf defendant avers that it proposes to construct a spur or industrial track which will be used exclusively for switching carload freight to and from such industries as may hereafter locate along said industrial or spur-track and have carload freights for switching and that said track will be operated within the yard limits and as a part of said station of San Mateo and exclusively as an industrial or spur-track of such station and in accordance with defendant's established policy of developing lands suitable for industrial sites and locations adjacent, contiguous and tributary to and in the immediate vicinity of de-

fendant's said line of railroad requiring railroad services.

VII.

Answering Paragraph VII of plaintiff's complaint defendant admits that unless defendant is enjoined therefrom it will continue the construction of said track and thereafter begin and continue the operation of the same, but denies it will continue the extension of any railroad as alleged in plaintiff's complaint or otherwise or at all.

Defendant denies that the maintenance or operation of said track across any alleged railroad of plaintiff will seriously or at [18] all impede or render more expensive, difficult or hazardous the construction of any alleged railroad of plaintiff or its operation after completion or otherwise or at all.

Defendant denies that pecuniary compensation will not afford relief to plaintiff for any injury that will be so done it or that it will be exceedingly or at all difficult to ascertain the amount of compensation which will afford adequate relief for any such alleged injury.

Defendant denies that it intends to maintain or operate any extension of any railroad of defendant into said new territory described in plaintiff's complaint and denies that the maintenance or operation of any said alleged extension of any alleged railroad of defendant in said new territory described in plaintiff's complaint will at all destroy in substantial or in any measure any value of any alleged railroad of the plaintiff or decrease the business or revenue of said alleged railroad or im-

pede or render more difficult or expensive the rendition by plaintiff of railroad service or facilities in said territory or in any other territory, or at all, and in behalf defendant avers that plaintiff has not now and never has had any railroad or business or revenue whatsoever.

Defendant denies that pecuniary compensation will not afford adequate relief to the plaintiff for any alleged injury that will be so done to it or that it will be exceedingly or at all difficult to ascertain the amount of compensation which will afford adequate relief for any such alleged injury and denies that plaintiff by reason of anything alleged in its complaint or otherwise, or at all, will sustain any injury of any kind whatsoever.

Defendant admits that said track at the present time consists of rails and ties laid upon the natural surface of the ground without grading or ballast and without being attached in the ground and capable of easy removal and that unless restrained therefrom defendant [19] will proceed forthwith to grade and ballast said track, imbed the same in the ground and make the same difficult of removal, and in this behalf defendant avers that at the time the restraining order was issued herein said track was being constructed in a workmanlike manner and had defendant not been restrained from so doing it would have completed the construction of said spur in accordance with the standards of constructing such spur or industrial track so as to adequately provide facilities with which to serve industries desirous of locating upon property served by said track, and defendant denies that by reason

of anything alleged in plaintiff's complaint or otherwise or at all the construction of said track would in every or any way make more difficult or expensive the construction by plaintiff of any railroad at any point specified in plaintiff's complaint or otherwise or at all, and in this behalf defendant avers that a certain deed executed by one Emma Rose and Andrew W. Rose on the 18th day of March, 1929, and recorded upon said date at page ten, volume four hundred seven of the Records of the County Recorder in the County of San Mateo granted unto said Southern Pacific Railroad Company, lessor of said defendant, the land upon which defendant intends to construct said spur or industrial track but upon the express condition that grantee, Southern Pacific Railroad Company will not oppose the crossing of a proposed line of railroad to be constructed by the Western Pacific Railroad Company or the Western Pacific California Railroad Company, or by any corporation controlled by either of said companies, across the right of way hereby conveyed, and that if said crossing is approved by the Railroad Commission of the State of California the grantee will, whenever said proposed line of railroad is constructed, grant to such other company the right to construct at its sole cost and expense its railroad across the right of way [20] hereby conveyed and the tracks constructed thereon by the grantee, subject to the terms and conditions of the usual and customary form of crossing agreement to be executed by grantee and such other company.

VIII.

Defendant avers that this court is without jurisdiction of the subject matter of this suit for the reason that plaintiff has a plain, adequate and complete remedy at law.

IX.

Defendant avers that this court is without jurisdiction of the subject matter of this suit for the reason that plaintiff is not a party in interest as provided by Paragraph 20 of Section 1 of the Interstate Commerce Act and has not the legal capacity to sue and is therefore not entitled to institute or maintain this suit.

WHEREFORE defendant prays that the temporary restraining order herein issued be dissolved and that a temporary injunction be denied, and that plaintiff's complaint be dismissed with costs.

Respectfully submitted,

C. W. DURBROW,

HENLEY C. BOOTH,

Attorneys for Defendant. [21]

United States of America,
State of California,
City and County of San Francisco,—ss.

W. A. Worthington, being duly sworn on behalf of the defendant in the above-entitled action, says that he is a vice-president of said corporation; that he has read the foregoing answer to plaintiff's amended complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated

on information and belief, and as to those matters that he believes it to be true.

W. A. WORTHINGTON.

Subscribed and sworn to before me, this 10th day of April, 1929.

[Seal] FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California.

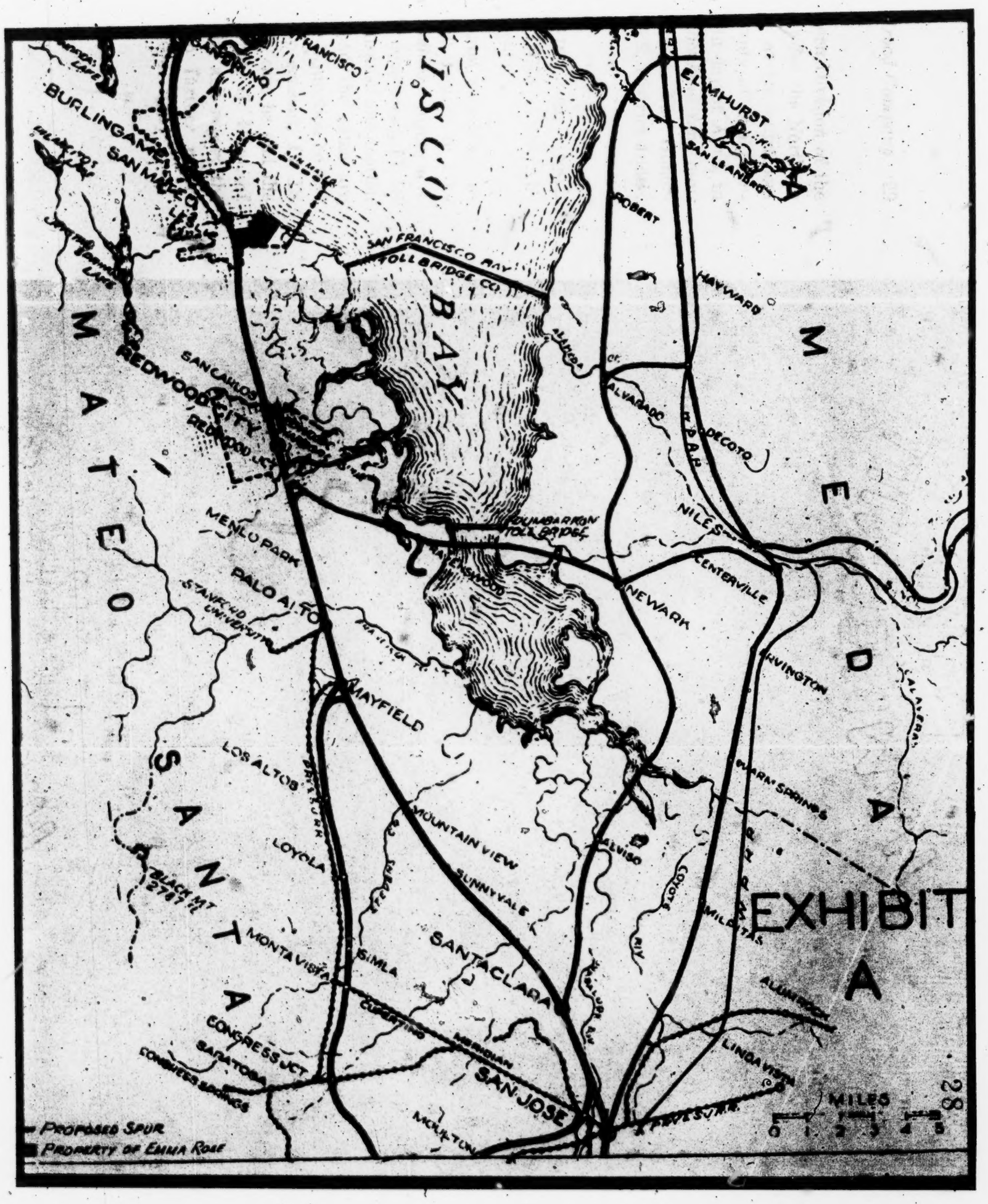
My commission expires June 20, 1931.

Copy of the within received this 11th day of April, 1929.

F. M. ANGELLOTTI,
A. S. HUTCHINSON,
WARREN OLNEY, Jr.,
Attorneys for Plaintiff.

[Endorsed]: Filed April 11, 1929. [22]

A L A M E D A
OAKLAND
EAST OAKLAND
FRUITVALE
ELMHURST
SAN LEANDRO
HAYWARD
DECOTO
NILES
CENTERVILLE
IRVINGTON
NEWARK
ALVARADO
ALAMEDA
SAN FRANCISCO BAY
SAN FRANCISCO
SOUTH SAN FRANCISCO
DALY CITY
COLMA
SAN MATEO
BURLINGAME
SAN CARLOS
REDWOOD CITY
MENLO PARK
PALO ALTO
STANFORD UNIVERSITY
MAYFIELD
SAN MATEO
OCEAN


SAN FRANCISCO
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SAN FRANCISCO BAY
TOLL BRIDGE CO.
SAN FRANCISCO BAY
REDWOOD CITY
SAN CARLOS
REDWOOD JCT.
MENLO PARK
PALO ALTO
STANFORD UNIVERSITY
DUMBARTON TOLL BRIDGE
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SIMLA
CUPERTINO
CONGRESS JCT
SARATOGA
CONGRESS SPRINGS
MOUNTAIN VIEW
SUNNYVALE
SANTA CLARA
SAN JOSE
MCKITTRICK
ELMHURST
SAN LEANDRO
ROBERT
HAYWARD
ALAMEDA
ALVARADO
DECOTO
NILES
CENTERVILLE
NEWARK
IRVINGTON
PLEASANTON
ELVISO
COYOTE RIV.
MILPITAS
ALUM ROCK
LINDA VISTA
MILES
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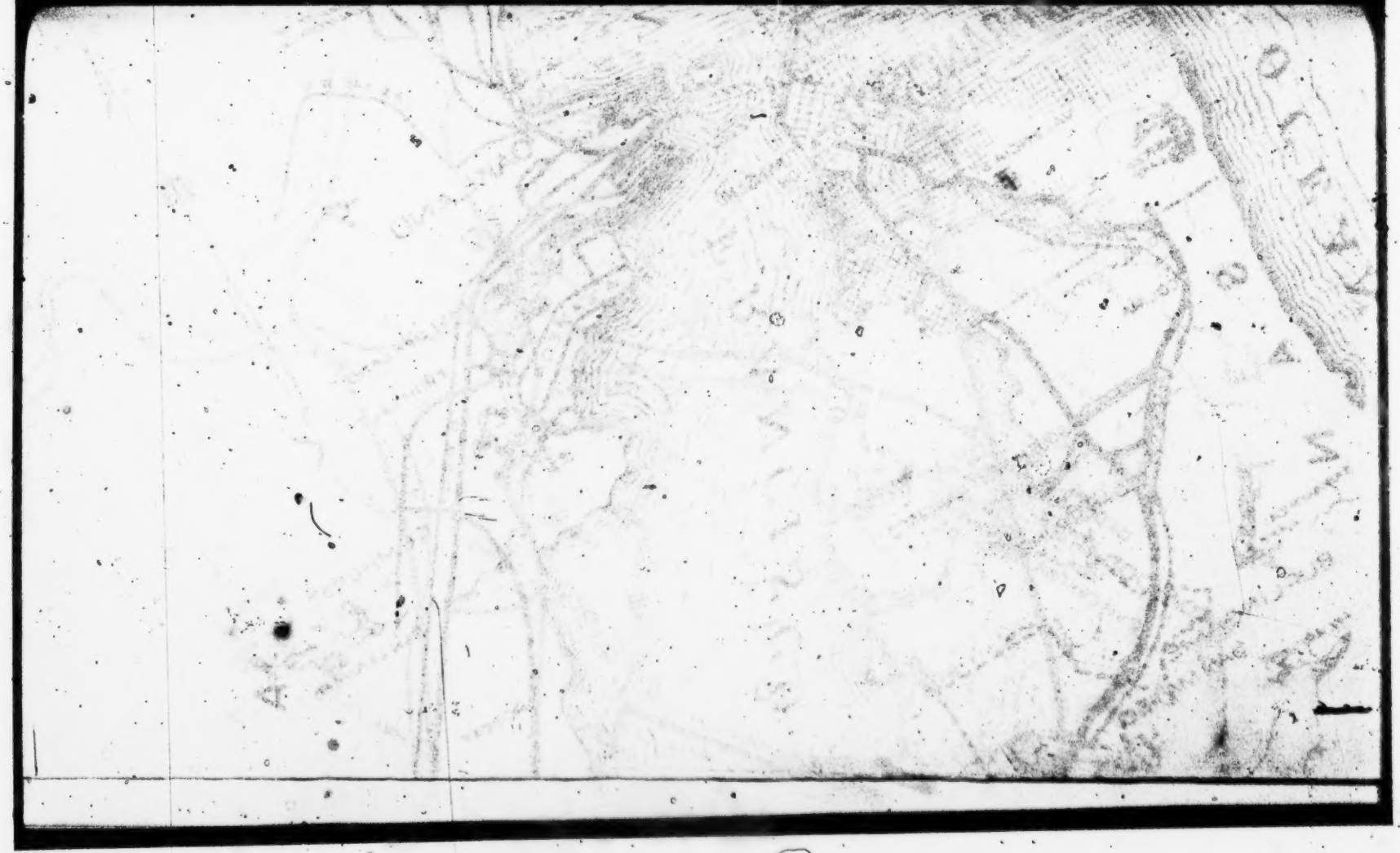
PROPOSED SPUR
PROPERTY OF EMMA ROSE
EXHIBIT A
28



At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 24th day of April, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 24, 1929.—ORDER DENYING MOTIONS AND APPOINTING SPECIAL MASTER.

This case, heretofore argued and submitted, as to the motion to dismiss the bill, motion to take testimony, and motion for preliminary injunction, and said motions being now fully considered, IT IS ORDERED that the motion to dismiss and motion to take further testimony, be and the same are hereby denied, and the motion for injunction be and the same is hereby granted. By consent, IT IS FURTHER ORDERED that this case be and the same is hereby referred to William H. Hunt, of San Francisco, California, to take and report the testimony offered herein, and to further report his findings and conclusions thereon. [24]

[Title of Court and Cause.]

ORDER GRANTING TEMPORARY INJUNCTION.

This cause came duly to be heard this term upon motion duly made for a temporary injunction pending the final hearing of said cause, upon the amended bill of complaint duly verified and filed on behalf of plaintiff and the answer of defendant to said amended complaint, and Warren Olney, Jr., Esq., and A. S. Hutchinson, Esq., appearing as counsel for the plaintiff in support of said motion, and C. W. Durbrow, Esq., and H. C. Booth, Esq., appearing on behalf of defendant, and after due deliberation,—

IT IS ORDERED, ADJUDGED AND DECREED that the motion for temporary injunction herein be and the same is hereby granted, and the said defendant, Southern Pacific Company, a corporation, its officers, agents and employees, and all persons and corporations who are or may be associated with it, is and are hereby restrained and enjoined, pending the final hearing of this cause and until the further order of the Court herein from maintaining or operating the railroad track heretofore constructed at a point within the city limits of the City of San Mateo, County of San Mateo, State of California, and close to the southerly city limits of said city, and across the location and route of plaintiff's railroad as in said amended complaint and hereinafter described, and from further extend-

ing said track and from grading or ballasting the same or embedding it in the ground or doing anything whatsoever designed to or the effect of which would be to render said track less capable of removal or make more difficult or expensive the construction by plaintiff of its proposed railroad at or near the point where the location of said railroad of plaintiff is crossed by said track, and from constructing, maintaining or operating any railroad track across plaintiff's [24A] said railroad, or extending into the territory lying easterly of said railroad of the plaintiff and between it and the Bay of San Francisco, and between the cities of South San Francisco and Redwood City, whether or not connecting with the railroad of said defendant, running from the City and County of San Francisco, State of California, southerly to and through Redwood City and passing through said City of San Mateo. Said location and route of plaintiff's railroad is described as follows:

> Commencing in the City and County of San Francisco, State of California, at a point in the vicinity of Islais Creek, and extending thence in a general southerly direction through said City and County of San Francisco, to, into and through San Mateo County, California, to and beyond Redwood City, San Mateo County, California, and along and in the vicinity of the westerly shore of the Bay of San Francisco.

IT IS FURTHER ORDERED, counsel for both parties having agreed thereto, that William H. Hunt, Esq., of the City and County of San Fran-

cisco, within said district, be and he hereby is appointed Special Master in this cause to take the testimony and report the findings of fact and conclusions of law to the Court with all convenient speed, subject to exceptions according to the usual course of chancery practice. This order is made upon a showing that an exceptional condition requires such order, namely, the cause is shown to the Court to require the immediate taking of testimony and prompt proceeding with the cause, and the District Judge is just entering upon a term of jury trials and cannot give personal attention to the hearing of testimony at this time.

Upon the filing of a bond approved by the Court in the sum of Ten Thousand Dollars ($10,000.00), let writ of injunction issue in accordance herewith.

Dated, San Francisco, California, April 26, 1929.

FRANK H. KERRIGAN,
United States District Judge.

Filed Apr. 26, 1929. [24B]

[Title of Cause.]

MEMORANDUM OPINION.

I have not prepared a formal opinion with reference to my rulings on the three motions submitted to me, but it occurs to me that it may be helpful to counsel to know the reasoning upon which my rulings are based.

The Southern Pacific Company has moved to dismiss the bill. The Western Pacific has moved

for permission to take further testimony prior to a ruling on its motion for a preliminary injunction. I do not believe that such further testimony is necessary, and am prepared to pass on the motion for a preliminary injunction without such testimony.

The Transportation Act of 1920 is an unmistakable declaration by Congress of its policy that the railway system of the United States shall be developed as a unit under the supervision of the Interstate Commerce Commission. To this end the Act provides that no extension of a railroad line shall be made except upon application to the Interstate Commerce Commission and receipt from it of a certificate of public convenience and necessity. "Any party at interest" may enjoin the construction of an extension begun without such application and certificate.

The Western Pacific has applied for a certificate permitting it to construct a certain new line. The Southern Pacific Company has commenced to lay track across the proposed line of the Western Pacific. The bill charges that this track is an extension. The Southern Pacific Company alleges that it is a spur or industrial track for which no certificate is required from the Interstate Commerce Commission. [25]

The first question is as to whether the Western Pacific is a party at interest entitled to maintain this injunction suit. Looking to the entire purpose and scope of the Transportation Act, I am convinced that it is a party at interest. The need of applying to the Interstate Commerce Commission

for permission to construct its proposed line delays actual construction. In the meanwhile a competing line builds track tapping territory which would otherwise be tributary to the proposed line. If this new track is in fact an extension, the road which first applied for permission to build through the same region appears plainly to have an interest which equity will recognize in requiring the second road to apply to the Interstate Commerce Commission, so that that body may consider the entire situation and make such orders as are called for.

On this reasoning, the bill states a cause of action for injunctive relief, and the motion to dismiss is therefore to be denied.

The answer filed admits that a new track, planned to extend 8,200 feet from defendant's main line easterly across plaintiff's proposed line, was under construction when the temporary restraining order herein was issued. It admits that such track is built into territory where no industrial plants now exist, in pursuance of a policy of industrial development of the defendant. In other words, the physical facts are not in dispute. The issues raised are as to the legal effect of defendant's acts, and as to plaintiff's standing in this court in the premises.

In this situation, I do not see that further evidence is necessary at the present juncture. Looking at the bill and the admissions of the answer, it appears to me that, under the reasoning of Texas & Pacific Ry. vs. Gulf, Colorado & Santa Fe Ry., 270 U. S. 266, plaintiff has made a sufficient showing to [26] warrant a preliminary injunction. I

am further moved by the consideration that, since it is admitted that no industries exist in the area affected, a preliminary injunction in this action is not depriving individuals of a traffic outlet.

I assume that the parties to this litigation are anxious for an early determination of the issues at a final hearing. My calendar for May and June is crowded, and I do not see the opportunity for giving you an early date. I suggest that this case might well be referred to a Special Master for hearing, and shall be glad to name any one of several persons to act in that capacity, for your consideration.

Wednesday, April 24, 1929.

Filed August 12, 1930. [27]

[Title of Court and Cause.]

REPORT OF SPECIAL MASTER.

In the above-entitled matter, pursuant to the order of the Honorable Frank H. Kerrigan, United States District Judge, the said order being dated April 26, 1929, and having designated me as Special Master to take the testimony and report the findings of fact and conclusions of law to the Court, subject to exceptions, according to the usual chancery practice, I did proceed at a time agreed upon by counsel for the respective parties to take testimony and thereafter to hear argument thereon, and now, having duly considered the same, and the ob-

jections and suggestions duly made by the parties, and having acted thereon, I submit this, my report, together with objections thereto. Maps 85 and 86 of Plaintiff's Exhibit 2, Plaintiff's Exhibit 7, and Defendant's Exhibit "F," are hereby made a part of this report.

FINDINGS OF FACT.

The plaintiff, since July 10, 1928, has been a railroad corporation organized and existing under the laws of the State of California, and is a resident and citizen of said state, having been organized, among other purposes, for the construction and [28] operation of a standard gauge line of railroad, commencing in the City and County of San Francisco, California, at a point in the vicinity of Islais Creek, and extending thence in a general southerly direction through said City and County of San Francisco to and through San Mateo County, California, to and beyond Redwood City in San Mateo, California. Plaintiff's purpose is to carry freight and other traffic for hire as a common carrier over and along said railroad from and to points on the line of said road between said terminals.

2. On the 11th day of July, 1928, plaintiff's Board of Directors, in a meeting regularly convened and held, duly adopted a resolution authorizing and directing the proper officers of the plaintiff to apply to the Interstate Commerce Commission for authority to construct, maintain and operate its said railroad between the City of San Francisco and Redwood City.

3. Plaintiff has not yet engaged in the construction of said railroad, pending authorization of said construction by the Interstate Commerce Commission of the United States before which body it has prosecuted its application for authorization. Hearing upon said application was had in San Francisco, California, by the Interstate Commerce Commission in January, 1929, but decision thereon has not been rendered by said Commission. The general route of the said railroad through the City and County of San Francisco and the County of San Mateo, a distance of about twenty-two miles, is along and in the vicinity of the westerly shore of the Bay of San Francisco.

4. The defendant, Southern Pacific Company, is a corporation organized and existing under the laws of the State of Kentucky, and is a citizen and resident of said state. The Southern Pacific Company is the owner or lessee, and in possession of, and operating a railroad system, which has been operated since 1863, extending [29] from the State of California into seven or more states of the United States, and also into the Republic of Mexico. The said Southern Pacific Company operates as a common carrier for transporting persons and property in interstate, intrastate and foreign commerce. For many years said company has been the owner or lessee and in possession of and operating a railroad with a double main track line from San Francisco southerly to and through Redwood City, and passing through the City of San Mateo to San Jose, California.

5. The route of plaintiff's railroad between the City of South San Francisco, southerly of the City of San Francisco, and Redwood City is a short distance easterly of and parallel with the main line of the railroad of the Southern Pacific Company. At or about the point where defendant's track, which it was engaged in constructing on March 23d, 1929, the distance between the location of plaintiff's railroad and defendant's main line is approximately 3,700 feet.

6. Between said two railroad lines runs a highway of the State of California, known as the Bay Shore Highway, one of the widest in California, which has been definitely located from the City of South San Francisco to Redwood City, and which has been constructed to Fifth Avenue in San Mateo. From that point on to Palo Alto its location has been staked on the ground and adopted by the Highway Commission of the State of California. The said highway is constructed to carry traffic of from ten to twenty thousand vehicles per day. The plats show that going from west to east there is, first, the Southern Pacific Railroad, then the Bay Shore Highway, and then the Western Pacific line.

7. The territory involved in the present proceeding is in San Mateo County, bounded on the east by the deep-water channel of San Francisco Bay, on the north by an east and west line running through South San Francisco, and the south by an approximate line which runs through Redwood City, and on the west by the Bay Shore Highway. There are approximately 23,300 acres in [30] this area,

7,200 of which lie between South San Francisco and Steinberger Creek, which are immediately available for industrial occupation. Farther to the south between Steinberger Creek and Redwood City there are approximately 3,400 acres of land which may, with some reclamation, be made available for industrial use. The territory just above described is desirable for industrial projects. (Plaintiff's Ex. 2, maps 85 and 86.) Said territory is new territory which has not heretofore been served by the defendant railroad.

8. During August, September and October, 1928, plaintiff proceeded diligently to survey and definitely locate its said line of railroad along the route of said projected location, and thereafter plaintiff's Board of Directors approved and adopted, about March 26, 1929, a definite location of said proposed line of railroad.

9. The defendant, Southern Pacific Company, intervened before the Interstate Commerce Commission in opposition to plaintiff's application to the Commission. At the hearing—at which defendant company appeared—in San Francisco in January, 1929, and after the introduction of testimony by plaintiff, which testimony showed the route of plaintiff's proposed railroad and that the same would run through the City of San Mateo parallel with the adopted location and right of way of the said Bay Shore Highway and to the east thereof and between said Highway and the Bay of San Francisco, the defendant Southern Pacific Company became cognizant of the exact route of plaintiff's said railroad

and of the fact that it intersects the southerly limits of the City of San Mateo at a point approximately 800 feet easterly from the intersection of the proposed right of way of the said Bay Shore Highway with the city limits of San Mateo. [31]

10. The Southern Pacific Company, on Saturday, March 23, 1929, about noon, with an attempt to avoid publicity, commenced the construction of a railroad track across the route of the plaintiff's said railroad at a point within the said City of San Mateo and close to the southerly city limits of said city, and upon that day and the following Sunday proceeded with such construction, so that by the following Monday morning the said defendant had laid a track directly across the route of the plaintiff's said railroad and across the Bay Shore Highway, and for some short distance on each side thereof.

11. The defendant proposed to construct a line of track extending at least as far from its main track as what is called the Toll Bridge Highway, but the plan of the defendant company, as evidenced by the authorities for expenditures, was to serve an unlimited territory extending to the Bay of San Francisco. Although defendant obtained from the owners of what is known as the Emma Rose property a right of way to the extreme easterly edge of the Emma Rose property in order to serve that property, defendant obtained a right of way from 40 to 50 feet in width, whereas, for industrial spurs, usually, the right of way is only 17 feet.

12. The said track so laid by defendant was not

ballasted; nor, except at the place where it crosses the Bay Shore Highway, were the ties spaced to an apparent standard. It had no actual connection with the railroad of the Southern Pacific Company. It commenced at a point within what is described as the Rose property approximately 2,500 feet easterly of defendant's main line and close to the location of said Bay Shore Highway, and extended northeasterly about 1442 feet across said location and across the route of plaintiff's railroad.

13. The Rose property referred to consists of approximately 500 acres south of South San Francisco and within the City [32] of San Mateo. It adjoins the defendant's main line right of way and has been zoned by ordinances of the City of San Mateo into light industrial, heavy industrial, and residential districts. Approximately 1907 feet of what is zoned as light industrial is immediately adjacent to defendant's main right of way. The owners of the Emma Rose property, by deed (Plaintiff's Exhibit 7) dated March 18, 1929, granted to the defendant a right of way on which to construct a single railroad track. One of the conditions in the deed was that the grantee should construct at its own expense and have ready for operation within six months from the date of the deed, a single railroad track upon certain parcels described in the deed, connecting with the main track of the Southern Pacific near Leslie Station, San Mateo County, California, and extending from the connection with said main track in a northeasterly direction to the southwesterly boundary of the San Francisco Bay

Toll Bridge right of way. (Defendant's Exhibit "F.")

14. Since the construction of said track by defendant across the route of the railroad of plaintiff, as hereinbefore found, the defendant has proceeded to extend the same easterly and westerly, the westerly extension being in the direction of the main line tracks of the railroad of the Southern Pacific Company.

15. The purpose of the Southern Pacific Company was and is to connect said track at its westerly end with the railroad of the Southern Pacific Company and to extend the said railroad at the easterly and northerly and southerly, and approximately parallel with the railroad of the plaintiff.

16. Said track was not built, nor when extended as aforesaid will it be built, for the purpose of serving any now-existing industry or settlement, or meeting any now-existing demand for railroad service. The territory into which the said track will extend easterly of the plaintiff's railroad and between plaintiff's [33] railroad and the Bay of San Francisco, and extending from the City of South San Francisco to Redwood City is unoccupied and undeveloped, there being at the present time no industry or settlement which requires railroad service at this time, nor which will, apparently, require railroad service in the immediate future.

17. On the 7th day of December, 1929, as a result of an investigation, on its own motion, of the construction of the defendant's said track and after a hearing at which defendant appeared, the Rail-

road Commission of the State of California duly gave and made its order to the effect that when the Southern Pacific Company desires to effect a crossing of the Bay Shore Highway by said track, such crossing shall be by means of a separation of grades, the cost of which shall be borne fifty per cent by the Southern Pacific Company and fifty per cent by the Department of Public Works of the State of California. In said order said Commission found that such a grade separation would cost between $75,000 and $115,000.

18. One of the objects of the plaintiff's proposed railroad, which was known to the Southern Pacific Company at the time the construction of defendant's said track was commenced, was to give railroad facilities to such territory as it may be developed and occupied by industries and settlements, the purpose being to afford such facilities to assist in and bring about occupation and development of such territory by industries and settlements which will require railroad service.

19. In building said track and extending the same as hereinbefore described, the purpose of the defendant company was to impede and prevent the construction and operation by plaintiff of its said proposed railroad and to prevent the construction and operation of plaintiff's railroad across said track by extending its railroad by means of said track in advance of the plaintiff's railroad into the territory heretobefore described as lying between [34] plaintiff's proposed railroad as located, and San Francisco Bay.

20. The construction of the track hereinbefore described by the defendant company was undertaken and prosecuted without there having been obtained from the Interstate Commerce Commission of the United States a certificate that the present or future public convenience and necessity require or will require the construction of said track, and without application being made to said Commission for such certificate.

21. The maintenance and operation of the track described across the railroad of the plaintiff will seriously impede and render more difficult and hazardous and expensive the construction of the plaintiff's railroad and its operation after completion.

22. The maintenance and operation of the railroad of the Southern Pacific Company into the said new territory will destroy in a substantial measure the value of the railroad of the plaintiff by decreasing the business and revenue of said railroad and impede and render more difficult and expensive the giving of railroad service and facilities to the new territory.

CONCLUSIONS OF LAW.

1. The defendant at the time of the institution of the present suit was a carrier by railroad, subject to the provisions of the Transportation Act of February 28, 1920, Chap. 91, sec. 402; 41 St. 456, 477, 478; Comp. St., sec. 8563; Fed. St. Anno. Sup. 1920, p. 98; 44 U. S. Code Ann., p. 1653.

Paragraph 18 of said Act provides:

"* * * no carrier by railroad subject to this Act shall undertake the extension of its

line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction * * * of such * * * extended line. * * * "

[35]

Paragraph 22 of said Act provides:

"The authority of the Commission * * * conferred * * * shall not extend to the construction of spur, industrial, team, switching or side tracks * * * to be located wholly within one state."

2. The defendant by its plan and construction has undertaken the extension of its line without having obtained from the Interstate Commerce Commission a certificate as required by said Paragraph 18.

3. The defendant by its plan and construction has not undertaken the construction of a spur, industrial, team, switching or side track.

4. Defendant's construction is contrary to the provisions of Paragraph 18 above referred to, and under Paragraph 20 of said Act, at the instance of this plaintiff, a party in interest, may be enjoined.

5. Plaintiff is entitled to injunction as prayed for.

Respectfully submitted,

WM. H. HUNT,

Special Master.

San Francisco, California, December 27th, 1929.

[Endorsed]: Filed Dec. 28, 1930. [36]

[Title of Court and Cause.]

DEFENDANT'S EXCEPTIONS TO REPORT OF SPECIAL MASTER.

Now comes Southern Pacific Company, defendant in the cause styled and numbered as above and excepts to the report of the Special Master in the above-entitled cause in the following particulars and for the following reasons:

(1) Defendant excepts to finding No. 3 because in connection with said finding the Master should have found, but failed to find, from the undisputed evidence, that the Examiner of the Interstate Commerce Commission who presided at the hearing of the application of plaintiff to construct its proposed railroad, recommended to said Interstate Commerce Commission in the proposed report submitted to said Commission by said Examiner "that the Commission find that present and future public convenience and necessity are not shown to require the construction by the applicant of the line of [37] railroad in San Francisco and San Mateo Counties, California, described in the application and in this report," and that thereafter plaintiff filed with the Interstate Commerce Commission an amended application to construct its proposed line of railroad between different termini than specified in its original application, and that said Interstate Commerce Commission thereafter, to wit, on October 17, 1929, reopened said proceedings for further hearing.

(2) Defendant excepts to finding No. 7 upon the ground that said finding is contrary to the evidence because the territory involved is not as specified in said finding but is only that certain piece or parcel of land owned and held in a single ownership by one Emma Rose, embracing not more than 500 acres which is not new territory and which has heretofore been served by defendant, and because the territory described in said finding No. 7, except said 500 acres, is not immediately available for industrial occupation and that the territory last described in said finding is not desirable for industrial projects.

(3) Defendant excepts to finding No. 11 because the Master should have found, but failed to find from the undisputed evidence, that the defendant proposed to construct a track extending only as far from its main track as what is called the southwesterly line of the right of way of the San Francisco Bay Toll Bridge Highway and that the deed granting defendant its right of way over and across the land of Emma Rose expressly requires defendant to construct its said track only "in a northeasterly direction to the southwesterly boundary of the San Francisco Bay Toll Bridge Company's right of way" and that the grade or grades of the railroad tracks upon said land and the elevation of said tracks "shall be such as best serve the land as it is now for industrial purposes," and the elevation of such track to be constructed on said land shall be subject to the approval of the [38] grantors; and that the plan of defendant, as evidenced by its au-

thorities for expenditure and uncontradicted evidence of its witnesses was, solely and exclusively, to serve the property of one Emma Rose consisting of approximately 500 acres lying between the main line railroad of defendant and what is called the Toll Bridge Highway, instead of finding "that the defendant proposed to construct a line of track extending at least as far from its main track as what is called the Toll Bridge Highway and that the plan of defendant company, as evidenced by the authorities for expenditure, was to serve an unlimited territory extending to the Bay of San Francisco," and because in connection with the said finding the Master should have found, but failed to find, that it was necessary for defendant to acquire a right of way from 40 to 50 feet wide in order to provide a borrow-pit to enable defendant to raise its said track as required by said deed granting it a right of way across said Emma Rose land.

(4) Defendant excepts to finding No. 12 because in connection with said finding the Master should have found, but failed to find from the undisputed evidence, that if defendant had not been prevented from continuing construction of its track by the restraining order and injunction which issued herein, defendant would have completely tied its track and provided a good running surface until such time as the owner of the property upon which it is laid definitely specified the grade line which was desired and that said track would have been connected with defendant's main line.

(5) Defendant excepts to finding No. 15 that

the purpose of defendant was and is "to extend said railroad at the easterly end northerly and southerly and approximately parallel with the railroad of the plaintiff" upon the ground that said finding is contrary to the evidence and because in this respect the Master should have found but failed to find that the purpose [39] of defendant was and is to only construct said track from a point on its main line easterly to the southwesterly line of the San Francisco Bay Toll Bridge Road right of way.

(6) Defendant excepts to finding No. 16 to the effect that said track will be "extended as aforesaid," that is, as stated in finding No. 15, and objects to said finding to the effect that said track will be extended into any territory easterly of plaintiff's railroad and between plaintiff's railroad and the Bay of San Francisco and extending from the City of South San Francisco to Redwood City, upon the ground that said findings are contrary to the uncontradicted evidence which shows that said track will only be constructed in an easterly direction to a point on the southwesterly line of the San Francisco Toll Bridge Road right of way and that there was no intention on the part of defendant to construct its tracks beyond this point; and defendant objects to the finding that at the present time there is no industry which will require railroad service in the immediate future for the reason that said track was built and will be built for the sole purpose of meeting the existing demands for railroad service and that there are industries which will require railroad service in the immediate future

and that defendant's track was built for the sole and exclusive purpose of developing said Rose property industrially, and when completed will meet existing demand for railroad service upon the 500 acres of land owned by Emma Rose and through which its said track will be constructed.

(7) Defendant excepts to finding No. 19 because said finding is contrary to the uncontradicted evidence and because the Master should have found, but failed to find from the undisputed evidence, that defendant's track was constructed in accordance with defendant's consistent policy of developing industrial territory adjacent to its main line right of way and that this particular project was conceived in 1921, the construction of the track was [40] authorized April 29, 1926, prior to the time plaintiff was incorporated on July 10, 1928, and before defendant's officers had any knowledge that plaintiff intended to construct its proposed line of railroad; and that the deed granting defendant a right of way across the property owned by Emma Rose was accepted upon the express condition that:

> "That Grantee will not oppose the crossing of a proposed line of railroad to be constructed by the Western Pacific Railroad Company or the Western Pacific California Railroad Company or by any corporation controlled by either of said companies, across the right of way hereby conveyed, and that if said crossing is approved by the Railroad Commission of the State of California, the Grantee will, whenever said proposed line of railroad is constructed,

grant to such other company the right to construct at its sole cost and expense its railroad across the right of way hereby conveyed and the tracks constructed thereon by the Grantee, subject to the terms and conditions of the usual and customary form of crossing agreement to be executed by Grantee and such other company."

(8) Defendant excepts to finding No. 21 because said finding is contrary to the undisputed evidence and also because said finding is unsupported by any evidence.

(9) Defendant excepts to finding No. 22 because said finding is contrary to the undisputed evidence and also because said finding is unsupported by any evidence.

(10) Defendant excepts to the master's report because the master should have found, but failed to find, that the location of defendant's said track was adopted April 29, 1926, that the location of said Bay Shore Highway was not adopted until October 11, 1926, and that the location of plaintiff's proposed railroad was not adopted until March 26, 1929, and that defendant began construction of its track March 23, 1929, three days before plaintiff adopted the location of its said proposed railroad and that the location of defendant's track was prior to the location of plaintiff's proposed railroad and prior to the location of said Bay Shore Highway.

(11) Defendant excepts to the master's report because the master should have found, but failed to find from the uncontradicted evidence, that at the

time of said hearing of this [41] matter neither the State of California, the Highway Commission of the State of California nor the plaintiff had acquired any right of way across defendant's track or right of way in the property of said Emma Rose; that defendant was not and is not required by the provisions of section 43 of the Public Utilities Act of the State of California, or any other section thereof, to obtain any certificate from the Railroad Commission of the State of California to construct its said track upon and along the entire right of way extending across said Emma Rose property.

(12) Defendant excepts to the master's report because the master should have found, but failed to find from the undisputed evidence, that defendant's track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks since the enactment of the Transportation Act and that at the time defendant was engaged in constructing its said track defendant had at least two hundred spur-tracks under construction at other points along its lines, and that said track will be constructed in accordance with a similar policy and practice which has been adopted by other carriers in California, including the Western Pacific Railroad Company of which plaintiff is a subsidiary, of constructing industrial switching spur-tracks at points along their lines to serve industries located thereon or to be located thereon.

(13) Defendant excepts to the master's report because the master should have found, but failed to find from the undisputed evidence, that the track

proposed to be constructed by defendant will, when constructed, be operated in the same manner as other industrial tracks constructed since the enactment of the Transportation Act and that said track will be used exclusively for switching purposes, no less than carload business will be handled, no passenger trains will be operated over said track, no trains or engines will be operated over said track on time-cards or schedules, the billing of freight to and from industries served by said track will be performed at the present [42] station of San Mateo, there will be no agent located at any point on said track, there will be no telegraph lines operated in connection with said track, there will be no freight sheds nor any station buildings at all located upon or adjacent to said track, operations upon said track will be conducted in the same manner as is usual and customary in switching carload freight to and from industries at other points on defendant's lines, all switching will be performed at night, there will be no storage track for the storage of cars in connection with said track, said track will be a part of defendant's San Mateo Station trackage facilities, rates published in defendant's freight tariffs to and from said San Mateo Station will apply to industries served by said track, no less than carload rates will apply to or from industries served by said track but said less than carload rates will only apply to and from said San Mateo Station, there will not be any additional switching charge assessed for moving shipments from or to San Mateo Station and

from and to industries served by said track, all shipments moving to and from industries served by said track will be billed by defendant's agent at San Mateo as originating at said station and there will be no express or mail service performed upon said track.

(14) Defendant excepts to the master's report because the master should have found, but failed to find from the evidence, that defendant's said track when constructed will be an industrial spur and switching track and that in accordance with the meaning of these words or terms as they appear in the Transportation Act of 1920 said track will be an industrial switching spur-track.

(15) Defendant excepts to the master's report because the master should have found, but failed to find from the undisputed evidence, that the original authority for expenditure and the first and second revisions thereof, were made in compliance with the provisions of Order No. 3 of the Interstate Commerce [43] Commission, were duly and regularly adopted and approved by the Executive Committee of defendant and described said track as an "industrial drill track," and that it is the intention of the defendant to build such a track along and upon its main line right of way of a length of 1960 feet and thence along and upon said right of way extending across said Emma Rose land of a length of 7,750 feet, for the sole and exclusive purpose of serving industries to be located upon said Emma Rose lands.

(16) Defendant excepts to the master's report

because the master should have found, but failed to find, that the Emma Rose land upon and across which defendant's said track will be constructed was, at the time defendant located its said track and at the time defendant acquired its right of way over and across said land, and is now, a part of the territory at all of said times being served by defendant and that at all of said times said land was not and is not now being served by any other common carrier.

(17) Defendant excepts to the master's conclusion of law No. 2 because the master erred in concluding that:

> "The defendant by its plan and construction has undertaken the extension of its line without having obtained from the Interstate Commerce Commission a certificate as required by said paragraph 18,"

and because the master should have concluded that said track is not an extension of defendant's line and that said track is a spur, industrial or switching track expressly excepted by Paragraph 22 of section 1 of the Interstate Commerce Act from the provisions of Paragraph 18 of section 1 of said Act and that defendant is not required to obtain a certificate from the Interstate Commerce Commission authorizing it to construct said track.

(18) Defendant excepts to the master's conclusion of Law No. 3 because the master erred in concluding that:

> "The defendant by its plan of construction has not undertaken the construction of a spur, industrial, team, switching or side track." [44]

because the master should have concluded that defendant by its plan and construction has undertaken the construction of a spur, industrial or switching track.

(19) Defendant excepts to the master's conclusion of law No. 4 because the master erred in concluding that defendant's construction is contrary to the provisions of Paragraph 18 of Section 1 of the Interstate Commerce Act and that under the provisions of Paragraph 20 of said section, at the instance of plaintiff, which is a party in interest, said construction may be enjoined when the master should have concluded that the provisions of Paragraph 18 of Section 1 of said act are inapplicable to the construction of said track by defendant for the reason that the power and authority confided to the Interstate Commerce Commission in said Paragraph 18 is expressly made inapplicable to the construction of said track by defendant by the provisions of Paragraph 22 of Section 1 of said act and defendant may, therefore, legally construct said track without obtaining any certificate from said Commission, and because the master should have concluded that plaintiff's complaint should be dismissed.

(20) Defendant excepts to the master's conclusion of law No. 5 because the master erred in concluding that plaintiff is entitled to an injunction as prayed for or that plaintiff is entitled to any injunctive relief, when the master should have concluded that plaintiff's complaint should be dismissed.

(21) Defendant excepts to the master's conclusions of law because the master should have concluded, but failed to conclude, that defendant's track was located and that defendant began the construction of said track prior to the time plaintiff located its proposed railroad, and that at the time defendant began constructing said track plaintiff had not acquired any right of way upon which to construct its proposed railroad upon, across the right of way owned by defendant or in the vicinity thereof, or over, across or upon the property of said Emma Rose, and that defendant was not and is not required to obtain a certificate from the Railroad Commission of the State of California as provided by Section 43 of the Public Utilities Act, and because the master should have concluded, but [45] failed to conclude, that the court is without jurisdiction to determine the right of the defendant to cross any location, right of way or tracks because such jurisdiction has been vested in the Railroad Commission of the State of California and plaintiff, therefore, has a plain, speedy and complete remedy at law.

Respectfully submitted,

H. C. BOOTH.

C. W. DURBROW.

GUY V. SHOUP,

Of Counsel.

[Endorsed]: Filed Jan. 16, 1930. [46]

[Title of Court and Cause.]

ORDER OVERRULING EXCEPTIONS TO REPORT OF SPECIAL MASTER, ETC.

IT IS HEREBY ORDERED:

1. Defendants' exceptions to the report of the Special Master herein are overruled.

2. The report of the Special Master is confirmed, and his findings of fact and conclusions of law are adopted as those of this Court.

3. The parties herein having stipulated that the sum of One Thousand Five Hundred Dollars ($1,500.00) is a reasonable compensation for the services of the Special Master herein, and it so appearing to the Court, Wm. H. Hunt, is hereby allowed said sum as compensation for his services as Special Master.

4. Let plaintiff have its injunction as prayed for.

January 31, 1930.

FRANK H. KERRIGAN.
FRANK H. KERRIGAN,
U. S. District Judge.

[Endorsed]: Filed January 31st, 1930. [47]

[Title of Court and Cause.]

SPECIFICATIONS OF REASONS WHY DECREE PREPARED BY COUNSEL FOR PLAINTIFF FOR THE SIGNATURE OF THE COURT IS DISAPPROVED BY COUNSEL FOR DEFENDANT.

Pursuant to Rule 22 of the Rules of Practice of the United States District Court, Northern District of California, defendant specifies the following reasons why the draft of final decree prepared and submitted by plaintiff's counsel for the signature of the Court is not approved:

1. Paragraphs "a," "b," "c," and "d" of said form of final decree, as appears from the uncontradicted evidence, relate to and embrace territory into which and across which defendant does not intend and has never intended to construct any railroad track of any kind or character whatsoever, that is to say, all territory lying easterly and northerly of the westerly boundary of the San Francisco Bay Toll Bridge right of way and northerly and southerly of the boundaries of the property owned by Emma Rose.

2. Paragraph "c" of said form of final decree, if entered as a final decree in the above-entitled matter, will have the effect of enjoining and preventing defendant from constructing any railroad track extending into any of the territory specified in said paragraph whether any such railroad track be in law or in fact a spur, industrial, team, [48]

switching or side track located or to be located wholly within one state as defined in Paragraph 22 of section 1 of the Interstate Commerce Act.

3. Paragraph "d" of said form of final decree, if entered as a final decree in the above-entitled matter, will have the effect of enjoining and preventing defendant from constructing any railroad track extending into any of the territory specified in said paragraph whether any such railroad track be in law or in fact a spur, industrial, team, switching or side track located or to be located wholly within one state as defined in Paragraph 22 of section 1 of the Interstate Commerce Act.

4. Said or any final decree entered in the above-entitled matter enjoining defendant from constructing any railroad track should be limited to the territory lying easterly and/or northerly of the southwesterly boundary of the San Francisco Bay Toll Bridge right of way and/or southerly and/or northerly of the boundaries of the property owned by said Emma Rose.

Respectfully submitted,

H. C. BOOTH.
C. W. DURBROW.

G. V. SHOUP,
Of Counsel.

Service of the within specifications is admitted this 24th day of February, 1930.

McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 28, 1930. [49]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 2348–K.—IN EQUITY.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

FINAL DECREE.

This cause came on to be heard this term upon the report, and exceptions thereto of defendant Southern Pacific Company, of Honorable William H. Hunt, Special Master of this court, to whom the cause was referred by consent of the parties, and the matter was argued by counsel and the said report was and is hereby confirmed. Thereupon, upon consideration thereof,—

IT IS ORDERED, ADJUDGED AND DECREED that defendant Southern Pacific Company, and each of its officers, agents and employees and all persons acting by or through or under them, or any of them, be, and they are, perpetually ENJOINED AND RESTRAINED as follows:

(a) From constructing, maintaining or operating the partially completed railroad track of defendant, upon, across or into any terri-

tory in the County of San Mateo, State of California, lying easterly of the location hereinafter described of the proposed railroad of plaintiff and between it and the Bay of San Francisco, and between the cities of South San Francisco and Redwood City. Said partially completed railroad track of defendant is situate in [50] San Mateo County, California, and the initial 8,200 feet of the proposed route thereof extends from a point near the railroad station of defendant called Leslie near the southerly city limits of the City of San Mateo, in an easterly and northeasterly direction, upon and across those two certain pieces or parcels of land situate, lying and being in the City of San Mateo, County of San Mateo, State of California, and particularly described as follows, to wit:

PARCEL No. 1:

That certain strip of land 40.0 feet in width, situate, lying and being in the City of San Mateo, County of San Mateo, State of California, lying adjacent to and northerly of the southerly City limit line of said City of San Mateo and the southerly line of property conveyed by Charity Hayward to Emma Rose by deed dated June 29, 1903, and recorded in Book 106 of Deeds, Page 576, San Mateo County, California, Records, and lying equally 20.0 feet on each side of the following described center line:

BEGINNING at a point in the said southerly City limit line of said City of San Mateo,

distant easterly thereon 220.0 feet, more or less, from the center line of eastbound main track of the Southern Pacific Railroad Company, San Francisco to San Jose; thence northeasterly on the arc of a curve concave to the right, having a radius of [51] 458.59 feet, an arc distance of 170.0 feet, more or less, to a point; thence easterly tangent to last described curve at the last mentioned point, parallel to and distant 20.0 feet at right angles northerly from said Southerly City limit line a distance of 765.0 feet, more or less, to a point. Containing an area of 0.84 of an acre, more or less.

PARCEL No. 2.

That certain strip of land 50 feet in width situate, lying and being in the City of San Mateo, County of San Mateo, State of California, lying 20.0 feet northerly and west and 30.0 feet southerly and east of the following described center line:

BEGINNING at a point distant 20.0 feet at right angles northerly from the southerly City limit line of the City of San Mateo and the southerly line of property conveyed by Charity Hayward to Emma Rose by deed dated June 29th, 1903, and recorded in Book 106 of Deeds, Page 576, San Mateo County, California, Records, and distant 1155.00 feet easterly, more or less, from the center line of the eastbound main track of the Southern Pacific Railroad Company measured along a line parallel to and distant 20.0 feet at right angles northerly from

said southerly City limit line; thence along the prolongation easterly of said center line described in Parcel No. 1 a distance of 3450.0 feet, [52] more or less, to a point; thence northeasterly on the arc of a curve concave to the left having a radius of 764.00 feet (the tangent to said curve at the last mentioned point is the last described course) an arc distance of 665.0 feet more or less to a point; thence north parallel to and distant 305.0 feet at right angles west, from the east line of Section 21, Township 4 South, Range 4 West, M. D. B. & M., tangent to last described curve at the last mentioned point a distance of 2,700.0 feet, more or less, to a point in the northerly boundary line of property described in deed, Charity Hayward to Emma Rose, dated June 29, 1903, and recorded in Book 106 of Deeds, Page 579, Records of San Mateo County, California, containing an area of 7.72 acres, more or less.

The located center line of the proposed railroad of plaintiff is particularly described as follows:

Commencing at a point in the center of the existing track on Quint Street, covered by Ordinance No. 270, City and County of San Francisco, approved April 12, 1901, said point of commencement being at or near the southwesterly line of Custer Avenue, approximately 25.5 feet northwesterly thereon from the southeasterly line of said Quint Street; thence southerly along a No. 8 turnout curve to the left ap-

proximately 80 feet; thence along a curve to the left having a radius of 409.51 feet a distance of approximately 206 feet, intersecting the southeasterly line of Quint Street at a point approximately 40 feet northeasterly thereon from the northeasterly line of Davidson Avenue and intersecting the northeasterly line of Davidson Avenue approximately 16 feet southeasterly thereon from the southeasterly line of Quint Street; thence southerly in a direct line approximately 119 feet, intersecting the southwesterly line of Davidson Avenue approximately 64 feet southeasterly [53] thereon from the southeasterly line of Quint Street; thence southeasterly along a curve to the left having a radius of 409.51 feet a distance of approximately 386 feet to a point on Evans Avenue 25 feet northeasterly, measured at right angle, from the southwesterly line of Evans Avenue and approximately 459 feet southeasterly, measured at right angle, from the southeasterly line of Quint Street, said last mentioned curve intersecting the northeasterly line of Evans Avenue at a point approximately 254 feet southeasterly thereon from the southeasterly line of Quint Street; thence southeasterly along Evans Avenue parallel with and 25 feet northeasterly, measured at right angle, from the southwesterly line of Evans Avenue, crossing the following intervening streets: Phelps Street, Third Street, Newhall Street, Mendell Street, Lane Street, Keith Street, Jen-

nings Street, Ingalls Street and Hawes Street, a distance of approximately 4,912 feet to a point approximately 541 feet northwesterly, measured at right angles, from the northwesterly line of Griffith Street; thence along a curve to the right having a radius of 573.14 feet a distance of approximately 900 feet, and intersecting the southwesterly line of said Evans Avenue at a point approximately 374 feet northwesterly thereon from the northwesterly line of Griffith Street, intersecting the northeasterly line of Fairfax Avenue, approximately 85 feet northwesterly thereon, from the northwesterly line of Griffith Street, intersecting the southwesterly line of Fairfax Avenue approximately 35 feet northwesterly thereon from the northwesterly line of Griffith Street, and intersecting the northwesterly line of Griffith Street at a point approximately 80 feet southwesterly thereon from the southwesterly line of Fairfax Avenue, to a point in the center line of Griffith Street approximately 68 feet southwesterly thereon measured along the center line of Griffith Street from the northeasterly line of Galvez Avenue; thence southwesterly along the center line of Griffith Street a distance of approximately 4,849 feet to a point approximately 18 feet north of the northerly line of Armstrong Avenue, and crossing the intervening streets as follows: Galvez Avenue, Hudson Avenue, Innes Avenue, Jerrold Avenue, Kirkwood Avenue, La Salle Avenue, McKinnon

Avenue, Newcomb Avenue, Oakdale Avenue, Palou Avenue, Quesada Avenue, Revere Avenue, Shafter Avenue, Thomas Avenue, Underwood Avenue, Van Dyke Avenue, Wallace Avenue and Yosemite Avenue; thence on a curve to the left, said curve having a radius of 955.04 feet, for a distance of 641.67 feet to a point of tangency, intersecting the northerly line of Carrol Avenue approximately 165 feet easterly along said street line from the easterly line of Griffith Street, said last named curve crossing Armstrong and Bancroft Avenues; thence from last mentioned point of tangency S. 3° 01′ E., crossing Carrol Avenue, Donner Avenue, Egbert Avenue, Fitch Street, Fitzgerald Avenue, Gilman Avenue, Earl Street, Hollister Avenue and Ingerson Avenue, a distance of [54] approximately 2,400 feet to point of tangency; thence on a curve to the right having a radius of 5,729.65 feet crossing Jamestown Avenue, Key Avenue and Donahue Street, a distance of 688.33 feet to point of tangency; thence on a tangent S. 3° 52′ W. crossing Le Conte Avenue, Meade Avenue, Nelson Avenue, Coleman Street and Olney Avenue, for a distance of approximately 1315 feet to a point on the boundary line between the City and County of San Francisco and County of San Mateo, said last named point being approximately 110 feet east of the easterly line of Coleman Street produced to intersect said boundary line; thence continuing on said tangent S. 3° 52′ W., a dis-

tance of 12,306 feet to point of tangency; said tangent also crossing the line between Sections 11 and 14 in T.–3–S., R.–5–W., M. D. B. & M., at a point 63.58 feet east of the corner of Sections 10, 11, 14 and 15; thence on a curve to the right having a radius of 5,729.65 feet, a distance of 663.33 feet to point of tangency; thence S. 10° 30′ W. on a tangent a distance of 5,101.56 feet to point of tangency, entering the City of South San Francisco at a point 256.75 feet west of the northeast corner of Lot 17, Section 15, T.–3–S., R.–5–W., M. D. B. & M.; said tangent also crossing the northerly right of way line of the South San Francisco Belt Railways at a point which is S. 54° 14½′ W., a distance of 325.57 feet from an angle point in said right of way line which angle point is west a distance of 595.30 feet from a 6″x6″ granite monument on the line between Sections 22 and 23, T.–3–S., R.–5–W., M. D. B. & M.; thence on a curve to the right having a radius of 955.04 feet, a distance of 920.55 feet to point of tangency; thence S. 65° 44′ W. on a tangent a distance of 1200 feet more or less to point of tangency; thence on a curve to the left having a radius of 955.04 feet, a distance of 747.50 feet to point of tangency, said last mentioned curve crossing the center line of Swift Avenue in the City of South San Francisco at a point 457.88 feet west of a monument at an angle point in said avenue; thence S. 20° 53′ W. on a tangent a distance of 1575 feet, more or less, to a point of

tangency; thence on a curve to the left having a radius of 2,864.83 feet, a distance of 1462.50 feet to point of tangency; thence S. 8° 22′ E. on a tangent a distance of 2,050 feet more or less to point of tangency; thence on a curve to the left having a radius of 5,729.65 feet, a distance of 1493.33 feet to point of tangency; thence S. 23° 18′ E. on a tangent a distance of approximately 2,825 feet, crossing the southerly boundary line of the City of South San Francisco at a point 375 feet west of the southeast corner of Lot 28 of Section 27, T.–3–S., R.–5–W., of Salt Marsh and Tide Land Survey No. 1 in San Mateo County; thence on a curve to the right having a radius of 11,459.2 feet, a distance of 670 feet to point of tangency; thence on a tangent S. 19° 57′ E., a distance of 473.24 feet to point of tangency; [55] thence on a curve to the left having a radius of 11,459.2 feet, a distance of 660 feet to point of tangency; thence on a tangent S. 23° 15′ E., parallel to and 50 feet easterly from the easterly line of the Bay Shore Highway a distance of approximately 3,407 feet to point of tangency; thence on a curve to the left having a radius of 2,864.82 feet, a distance of 922.5 feet to point of tangency; thence S. 41° 4′ E., a distance of approximately 3,316 feet to a point of tangency; this course being parallel to and 400 feet easterly from the eastern boundary line of the Bay Shore Highway or its production; thence on a curve to the left having a radius of 2,664.82

feet, a distance of 961 feet to point of tangency, this curve crossing the line between Sections 2 and 11, T.–4–S., R.–5–W., M. D. B. & M., at a point which is N. 69° 58′ E., a distance of 553.15 feet from the quarter corner common to Sections 2 and 11 as said quarter corner is witnessed by a 6″ concrete monument marked "ME. 22. 1" set due south a distance of 242.42 feet; thence from point of tangency S. 60° 55′ E., a distance of 2,219.36 feet to point of tangency, said last named point of tangency being approximately on the line between Sections 11 and 12, which section line is the westerly boundary of the City of Burlingame, said point of intersection with said section line being approximately 1260 feet south of the corner common to Sections 1, 2, 11 and 12; thence on a curve to the right having a radius of 2,864.82 feet, a distance of 1,595.83 feet to point of tangency; thence on a tangent S. 29° 00′ E., a distance of approximately 2,380.00 feet to point of tangency, said last named point of tangency being on the line between Sections 12 and 13 intersecting said section line at a point which is N. 89° 10′ E., a distance of 263.72 feet from the quarter section corner common to said Sections 12 and 13; thence on a curve to the left having a radius of 1,909.91 feet, a distance of 1,922.23 feet to point of tangency, said last named point being 50 feet northerly from the northerly line of Pacific Gas & Electric Company right of way which

is 140 feet wide; thence S. 85° 45′ 45″ E., parallel to and 50 feet northerly from said right of way line a distance of 4,744.55 feet to point of tangency; thence on a curve to the left having a radius of 5,729.65 feet, a distance of 502.08 feet to point of tangency; thence N. 89° 13′ E., a distance of 541.79 feet to point of tangency; thence on a curve to the right having a radius of 2,864.82 feet, a distance of 608.33 feet to point of tangency; said curve crossing the line between the property of E. W. McLellan Company and William Howard Estate at a point which is North 261.85 feet from the southwesterly corner of the property of the William Howard Estate on the center line of Burlingame Avenue produced northeasterly, said curve also crossing the section line between Sections 17 and 18 which is the boundary line between the cities of Burlingame and San Mateo; thence on a tangent S. 78° 37′ E., a distance [56] of 1120.72 feet to point of tangency; thence on a curve to the right having a radius of 1432.46 feet, a distance of 944.44 feet to point of tangency, said last named point of tangency being in Peninsula Avenue N. 48° 53½′ E., a distance of 207 feet and N. 40° 31′ W., a distance of 16.75 feet from a concrete monument marking the most northerly corner of College Highlands Subdivision in the City of San Mateo; thence on a tangent S. 40° 51′ E. parallel to and a distance of 882.31 feet easterly from the easterly boundary line of

the Bay Shore Highway crossing Poplar Avenue, Mount Diablo Avenue and Third Avenue in the City of San Mateo, a distance of 11,007 feet, more or less, to point of tangency; thence on a curve to the right having a radius of 5,729.65 feet, a distance of 440.83 feet to point of tangency; thence on a tangent S. 36° 26½′ E., a distance of 333.4 feet to a point on the southerly boundary line of the City of San Mateo, said point being S. 59° 42′ W., a distance of 987.15 feet from the corner common to Sections 21, 22, 27 and 28, T.–4–S., R.–4–W., M. D. B. & M.; thence continuing on said course S. 36° 26½′ E., a distance of 16,244.65 feet to point of tangency, said last named course crossing the line between the properties of Thomas Pennington and Charles K. Smith at a point which is N. 69° 54′ W., a distance of 360.06 feet from a 4 by 4 stake marking the northeasterly corner of the property of said Charles K. Smith in Section 2, T.–5–S., R.–4–W., M. D. B. & M.; thence from last named point of tangency on a curve to the left having a radius of 5,729.65 feet, a distance of 562.5 feet to point of tangency; thence S. 42° 04′ E. parallel to and a distance of 530 feet northeasterly from the easterly boundary of the Bay Shore Highway as located, or its production, a distance of 16,178.55 feet to point of tangency, said last named tangent crossing the line between T.–5–S., R.–3–W. and T.–5–S., R.–4–W. at a point which is S. 3° 03′ E., a distance of 700.3

feet from the corner common to Sections 7, 12, 13 and 18; thence on a curve to the left having a radius of 1,432.46 feet, a distance of 978.32 feet to point of tangency, said last named point of tangency being 50 feet northerly, measured at right angles, from the northerly line of the Bay Shore Highway as located; thence in a line parallel to said Bay Shore Highway S. 81° 12′ E., crossing Steinberger Street a distance of 1,792.09 feet to point of tangency; thence on a curve to the left having a radius of 955.04 feet, a distance of 1382.57 feet to point of tangency; thence N. 15° 51′ E., on a tangent, a distance of 641.14 feet to a point on the north and south quarter section line in Section 17, T.–5–S., R.–3–W., M. D. B. & M.; which point is N. 0° 01′ W., a distance of 846.07 feet from the quarter corner common to Sections 17 and 20; thence continuing on said course N. 15° 51′ E., a distance of 4,123.40 feet to point of tangency; thence on a curve to the right having a radius of 5,729.65 feet, a distance of 461.67 feet to point of tangency, said last named point of tangency being 50 feet westerly, [57] measured at right angles, from the westerly line of the Southern Pacific right of way; thence N. 20° 28′ E., parallel to said Southern Pacific right of way line, a distance of 2,211.07 feet to point of tangency; thence on a curve to the right continuing parallel to said Southern Pacific right of way line, said curve having a radius of 1099.91 feet, a distance of 565.2 feet

to a point on the southwesterly property line of the Pacific Portland Cement Company's manufacturing plant near Redwood City, said point of intersection being N. 51° 52′ W., a distance of 50.5 feet from the northwesterly right of way line of the Southern Pacific Company.

(b) From constructing, maintaining or operating the said partially completed railroad track of defendant upon, across or into any territory in the County of San Mateo, State of California, which lies easterly of the present located line of the Highway of the State of California, known as Bay Shore Highway and between it and the deep water channel of the Bay of San Francisco and between the cities of South San Francisco and Redwood City.

(c) ~~From constructing any railroad track extending into any of the territory in San Mateo County, California, lying easterly of said above described location of the said proposed railroad of plaintiff and between it and the Bay of San Francisco and between the cities of South San Francisco and Redwood City.~~

F.H.K.

(d) ~~From constructing any railroad track extending into any of the territory in San Mateo County, California, which lies easterly of the present located line of the Highway of the State of California, known as the Bay Shore Highway and between it and the deep water channel of the Bay of San Francisco and between South San Francisco and Redwood City;~~ [58]

F.H.K.

unless and until there has first been obtained from the Interstate Commerce Commission of the United States its certificate that the present or future public convenience or necessity requires or will require the construction of such extension.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said plaintiff have judgment against said defendant for its costs herein, taxed in the sum of ——— dollars, and that said plaintiff have execution for such costs.

Dated: San Francisco, California, this 28th day of February, 1930.

FRANK H. KERRIGAN,
United States District Judge.

Filed Feb. 28, 1930. [59]

[Title of Court and Cause.]

MOTION TO LIMIT INJUNCTION.

Now comes the defendant and moves, petitions and prays the Court to limit the injunction which the Court, by its order entered on the 28th day of February, 1930, granted plaintiff herein so as to only restrain defendant from constructing, maintaining and operating or extending, maintaining and operating its partially completed railroad track across or into any territory in the county of San Mateo, State of California, which lies easterly and northerly of the westerly boundary of the San Francisco Bay Toll Bridge right of way, and northerly and southerly of the boundaries of the property

owned by one Emma Rose lying in said city of San Mateo and more particularly described in that certain deed executed by Charity Hayward to Emma Rose dated June 29, 1903, and recorded in Book 106 of Deeds, page 576, Records of San Mateo County, California, unless and until the defendant shall first have obtained from the Interstate Commerce Commission of the United States its certificate that the present or future public convenience or necessity requires or will require the construction of such railroad track, and so as not to restrain the defendant from completing the construction of said partially completed railroad track and maintaining and operating said track after completion within the limits of the said [60] Emma Rose property containing about 500 acres, more or less, upon the right of way hereinafter described, upon the grounds urged by the defendant in brief filed with the Special Master and urged by the defendant in oral argument presented to the court that the track which defendant intends to construct upon along and across said right of way will only be upon lands immediately adjacent to the main line right of way of the defendant and into territory already served by defendant and which has not heretofore at any time been served by any other carrier, and that said track which defendant intends to construct upon said land and right of way is an industrial spur or switching track as defined by Paragraph 22 of Section 1 of the Interstate Commerce Act and, as expressly provided in said paragraph, the authority of the Interstate Commerce

Commission, conferred by Paragraphs 18 to 21, both inclusive, of said Section 1, does not extend to the construction of the track which defendant intends to construct and therefore defendant is not required by said Act to obtain a certificate of public necessity and convenience from the Interstate Commerce Commission to construct said track upon said right of way and land hereinbefore described, and upon the further grounds that the injunction granted is broader and more comprehensive than the findings of fact and conclusions of law justify and/or the necessities of the case require.

The right of way and lands upon which defendant intends to construct said track are described as follows, to wit:

PARCEL No. 1.

That certain strip of land 40.0 feet in width, situate, lying and being in the City of San Mateo, County of San Mateo, State of California, lying adjacent to and northerly of the southerly City limit line of said City of San Mateo and the [61] southerly line of property conveyed by Charity Hayward to Emma Rose by deed dated June 29, 1903, and recorded in Book 106 of Deeds, Page 576, San Mateo County, California, Records, and lying equally 20.0 feet on each side of the following described center line;

BEGINNING at a point in the said southerly City limit line of said City of San Mateo, distant easterly thereon 220.0 feet, more or less, from the center line of eastbound main track of

the Southern Pacific Railroad Company, San Francisco to San Jose; thence northeasterly on the arc of a curve concave to the right, having a radius of 458.59 feet, an arc distance of 170.0 feet, more or less, to a point; thence easterly tangent to last described curve at the last mentioned point, parallel to and distant 20.0 feet at right angles northerly from said Southerly City limit line a distance of 765.0 feet more or less to a point, Containing an area of 0.84 of an acre, more or less.

PARCEL No. 2.

That certain strip of land 50 feet in width situate, lying and being in the City of San Mateo, County of San Mateo, State of California, lying 20.0 feet northerly and west and 30.0 feet southerly and east of the following described center line:

BEGINNING at a point distant 20.0 feet at right angles northerly from the southerly City limit line of the City of San Mateo and southerly line of property conveyed by Charity Hayward to Emma Rose by deed dated June 29th, 1903, and recorded [62] in Book 106, of Deeds, Page 576, San Mateo County, California, Records, and distant 1155.00 feet easterly, more or less, from the center line of the eastbound main track of the Southern Pacific Railroad Company measured along a line parallel to and distant 20.0 feet at right angles northerly from said southerly City Limit line; thence along the prolongation easterly of said

center line described in Parcel #1 a distance of 3450.0 feet, more or less, to a point; thence northeasterly on the arc of a curve concave to the left having a radius of 764.08 feet (the tangent to said curve at the last mentioned point is the last described course) an arc distance of 665.0 feet more or less to a point; thence north parallel to and distant 305.0 feet at right angles west, from the east line of Section 21, Township 4 South, Range 4 West, M. D. B. & M., tangent to last described curve at the last mentioned point a distance of 2700.0 feet, more or less, to a point in the northerly boundary line of property described in deed, Charity Hayward to Emma Rose, dated June 29, 1903, and recorded in Book 106 of Deeds, Page 576, Records of San Mateo County, California, containing an area of 7.72 acres, more or less.

Respectfully submitted,
H. C. BOOTH,
C. O. AMONETTE,
C. W. DURBROW,
Attorneys for Defendant.

G. V. SHOUP,
Of Counsel.

[Endorsed]: Filed Mar. 6, 1930.

Service of the within motion to limit injunction is admitted this 6th day of March, 1930.

McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Plaintiff. [63]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 10th day of March, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN.

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 10, 1930—ORDER DENYING MOTION FOR ORDER TO LIMIT SCOPE AND EFFECT OF INJUNCTION GRANTED.

After hearing arguments of attorneys for respective parties, ORDERED motion of defendant for order to limit scope and effect of injunction granted plaintiff on February 28, 1930, be denied and exception entered. [63A]

[Title of Court and Cause.]

STIPULATION AGREEING ON CONDENSED STATEMENT OF EVIDENCE.

The defendant (appellant) having duly lodged with the Clerk of this court its statement of evidence and having given due notice of such lodgment and of the time of the proposed settlement thereof to the solicitors for plaintiff (appellee), which time

has been extended by stipulation of parties and order of Court to July 16, 1930, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, and the plaintiff having duly lodged in said Clerk's office amendments proposed by it to the statement of evidence proposed by the defendant, and counsel for both parties having agreed on the amendments to and changes in defendant's proposed statement of evidence, and in plaintiff's proposed amendments thereto, and with respect to the original exhibits necessary to be transmitted to the Circuit Court of Appeals.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the attached "agreed condensed statement of evidence" in narrative form, having therein certain selected portions of the testimony reproduced by question and answer which are necessary for a full understanding of the testimony, together with the original exhibits specified in said statement of evidence, as transmitted to the Circuit Court of Appeals under order of this Court, contains all of the evidence introduced in the above-entitled cause [64] essential to the decision of the questions presented by the appeal, and that when approved by the Trial Judge, said "agreed condensed statement of evidence" may be filed in the Clerk's office and become a part of the record for the purposes of the appeal in the above-entitled cause.

Dated: July 16, 1930.

F. M. ANGELLOTTI,
WARREN OLNEY, Jr.,
A. S. HUTCHINSON,
J. M. MANNON, Jr.,
Attorneys for Plaintiff.
C. O. AMONETTE,
H. C. BOOTH,
C. W. DURBROW,
Attorneys for Defendant. [65]

[Title of Court and Cause.]

AGREED CONDENSED STATEMENT OF EVIDENCE.

TESTIMONY OF JOSEPH W. WILLIAMS, FOR PLAINTIFF.

JOSEPH W. WILLIAMS, a witness called by the plaintiff, being first duly sworn by the master, testified as follows:

On Direct Examination by Mr. MANNON.

I am a civil engineer. Since August 1, 1921, I have been chief engineer of the Western Pacific Railroad Company. For two years I was chief engineer of the Northwestern Pacific Railroad and for three years chief engineer of construction of that railroad. For seven years I was assistant chief engineer of the Northwestern Pacific R. R. Company. For four years I served in various engineering capacities on railroad location, construc-

(Testimony of Joseph W. Williams.)

tion and maintenance with the Atchison, Topeka & Santa Fe Railway, and for an additional three years I served in various minor capacities on various small railroads in New Mexico. At present I am chief engineer for the Western Pacific California Railroad.

Western Pacific California Railroad is a line having its originating point in San Francisco, in the Islais Creek district, and extending in a generally southerly direction down the peninsula about twenty-five miles to a terminating point in [66] the vicinity of the Pacific Portland Cement Company's plant at Redwood City.

The line that I have just described, that is, the line of the Western Pacific California Railroad Company, is this line that is indicated in a solid red line that I am tracing with my pencil on Plaintiff's Exhibit 1. It extends from a point in Quint Street, in San Francisco, easterly along Evans Avenue to Griffith Street; thence along the center line of Griffith Street and by means of a tunnel under Hunters Point, and thence in a southerly direction to Sierra Point; thence through the industrial area of South San Francisco and following to the east of the Bay Shore highway, and to the westerly shore of San Francisco Bay, in a generally southerly direction, to Redwood City; thence turning out to the north to the plant of the Pacific Portland Cement Company. The map, Plaintiff's Exhibit 1, correctly delineates the general situation.

(Testimony of Joseph W. Williams.)

(Original exhibit transmitted to Circuit Court of Appeals by order of District Court.)

The Bay Shore highway is a main vehicular artery leading from the Peninsular country into San Francisco. It is being built by the city and county of San Francisco, within the city limits, and by the Department of Public Works, Division of Highways, State of California, south of the city limits. It terminates in the city of San Francisco, at Potrero Avenue, which is in this vicinity, here, on the map (Plaintiff's Exhibit 1); thence it runs southerly about along the line of the old San Bruno Avenue to the southerly city limits. It is out through this general direction. Thence on the westerly side of the Southern Pacific's main line to Los Angeles, which is indicated in green on this map, to South San Francisco, where it passes under the Southern Pacific line by means of a subway; thence it runs southeasterly to Redwood City, along the same general route [67] I have described for the line of the Western Pacific California Railroad Company. The highway is located to the west of the Western Pacific California Railroad Company's line, and to the east of the Southern Pacific's main line to Los Angeles. I believe the width of the highway is 125 feet.

Note. The evidence was received at this time by the master in order that he might get the physical situation in mind, with the reservation that if the evidence had a further or more extended legal bearing that question would be passed upon later.

(Testimony of Joseph W. Williams.)

The point of origin of the Southern Pacific in San Francisco is at the Third and Townsend Street station; thence it runs southerly along the line indicated in green on this map (Plaintiff's Exhibit 1), through San Francisco, through South San Francisco, through San Mateo, San Bruno, Millbrae, Burlingame, Redwood City, and thence on to the south.

The Western Pacific California Railroad Company made an application to the Interstate Commerce Commission for permission to construct its line down the Peninsula. Hearings were held in connection with that matter in San Francisco in January of this year (1929).

A certified copy of an application before the Interstate Commerce Commission in the matter of the application of the Western Pacific California Railroad Company, Finance Docket 7025, was received in evidence as a portion of Plaintiff's Exhibit 2. So far as pertinent, this application reads as follows:

> "(c) Applicant proposes to construct a new line of railroad from a point in the City and County of San Francisco to and into the County of San Mateo, to a point of termination near Redwood City, San Mateo County, California. * * * [68]
>
> "(k) The route and termini of the proposed new line is as follows, viz.:
>
> "A line of railroad commencing at a point in the City and County of San Francisco in

Quint Street in the vicinity of Islais Creek and extending thence in a general southeasterly direction in said City and County of San Francisco approximately 1.0 mile; thence in a general southerly and southeasterly direction approximately 22 miles through said City and County of San Francisco and San Mateo County, California, in the vicinity of the westerly shore of the Bay of San Francisco to Redwood City in said San Mateo County; thence in a general easterly and northeasterly direction approximately 2.0 miles to a point at or near the plant of the Pacific Portland Cement Company in said San Mateo County.

"(1) The total number of miles of main track of the proposed new line of railroad is approximately 25 miles."

There was also received in evidence as a part of Exhibit 2 certified copy of Return to Questionnaire in the Matter of the Application of Western Pacific California Railroad Company, Finance Docket No. 7025. So far as pertinent, the questionnaire is as follows:

"Western Pacific California Railroad Company, having made application to the Interstate Commerce Commission under paragraph (18) of Section 1 of the Interstate Commerce Act, for a certificate of public convenience and necessity for the construction by it of a new line of railroad from a point in the City and County of San Francisco to and into the County of

San Mateo to a point of termination near Redwood City, San Mateo County, California * * * . Applicant also submits the following information required by the Commission: * * *

"ANSWER 29. The estimated cost of the proposed line is $3,916,420.00."

There was also received in evidence as a portion of Exhibit 2 certified copies of the following maps:

1. Map accompanying application of Western Pacific in Finance Docket 7025, entitled "Exhibit 'A,' Western Pacific California Railroad Company proposed line, San Francisco, California, to Redwood City, dated June, 1928." [68A]

2. Map accompanying Western Pacific application in Finance Docket 7025, entitled "Exhibit 'B,' Western Pacific California Railroad Company proposed line, San Francisco, California, to Redwood City, California, dated June, 1928."

3. Map accompanying Return to Questionnaire in the Matter of Application of Western Pacific California Railroad Finance Docket No. 7025, entitled "Exhibit 'C,' Western Pacific California Railroad Company proposed line, San Francisco, California, to Redwood City, California, dated June, 1928."

4. Map entitled "Southern Pacific Company, Pacific lines, proposed Western Pacific California Railroad Company route San Francisco-Redwood City, December 19th, 1928."

5. Map entitled "Southern Pacific Company,

(Testimony of Joseph W. Williams.)

Pacific Lines, map of Southern Pacific and other railroad lines for territory shown."

6. Map in six parts entitled "Southern Pacific Company Pacific Lines, map showing location of Southern Pacific Lines together with the projected location of the Western Pacific California R. R. Co., Lines, January, 1929." Part 1 of map designated as "Exhibit No. 82, Witness ——, Finance Docket 7025." Part 2 of map designated "Exhibit No. 83, Witness ——, Finance Docket 7025." Part 3 of map designated "Exhibit No. 84, Witness ——, Finance Docket 7205." Part 4 of map designated "Exhibit No. 85, Witness ——, Finance Docket 7025." Part 5 of map designated Exhibit 86, Witness ——, Finance Docket 7025." Part 6 of map designated "Exhibit No. 87, Witness ——, Finance Docket 7025."

7. Map entitled "Exhibit ——, C. E. 961."

There was also received in evidence as a part of Exhibit 2, certified copy of appendix to brief for intervener Southern Pacific Company, Finance Docket No. 7025.

(Original exhibit transmitted to Circuit Court of Appeals by order of District Court.) [69]

The Southern Pacific Company was represented at the hearing by counsel and witnesses.

I have indicated on Plaintiff's Exhibit No. 1 the construction by the Southern Pacific in San Mateo County. The line in solid black here in the immediate vicinity of the southerly city limits of San Mateo is a line constructed, or partially con-

(Testimony of Joseph W. Williams.)

structed, by Southern Pacific Company on the property of the Emma Rose Estate.

The Bay Shore Highway, through the Emma Rose Estate, is located westerly of and parallel with the line of the Western Pacific California Railroad Company, which is indicated on the map in red and about 845 feet westerly of the line of the Western Pacific California Railroad Company.

The San Francisco Bay Toll Bridge is indicated on the map and marked "San Francisco Bay Toll Bridge." The approach to it is at Third Avenue, San Mateo, and thence along the line that I am tracing just south of the shore of the bay; thence across the bay on this line that is plainly marked on the map. The approach to the toll bridge on the westerly side runs across a portion of the Emma Rose Estate.

The initial point of the track being constructed by the Southern Pacific, or its westerly end, is about 2,500 feet easterly from the Southern Pacific's main line; thence a track extends on a tangent or straight line running northeast about 1,442 feet. I have a plat of that road.

The track is laid immediately on top of the ground, except for the portion across the Bay Shore highway, the ties are not spaced as ties are spaced on a completed track. There are only a portion of the number of ties that would be necessary under this track, or under any other track that was in a completed state. [70] Across the Bay Shore highway, however, the ties are spaced normally as they would be in a completed track.

(Testimony of Joseph W. Williams.)

In railroad engineering, the standard of construction generally is so many ties per rail. The number of ties under rails 33 feet in length vary from 18 to 22 ties per rail. Commencing with the westerly side of the 1440-foot track, the first rail panel has five ties, the next 8 ties, the next 6, the next 7, the next 6. Then for the section taking in the Bay Shore Highway and a little distance beyond right of way lines of that highway there are 16 ties per panel. Thereafter and to the east 9 ties per panel. Thereafter 10, 8, 7, 7, 6, 5, 6, 8, 7, 6, 8, 6, 8 ties per panel and then 4 ties per panel for a long section and then 6 to a terminal point.

A plat of the constructed portion of defendant's railroad track entitled "Plat of track laid by Southern Pacific Company Saturday afternoon and Sunday, March 23d and 24th, 1929, near Leslie Station, City of San Mateo, San Mateo County, California" was received in evidence as Plaintiff's Exhibit No. 3. The number of ties per panel is indicated on this plat in black figures immediately under the diagram that indicates the track. The areas on either side of the figures indicate the length or section of track where the ties per panel is indicated.

(Original exhibit transmitted to Circuit Court of Appeals by order of District Court.)

Eight-foot redwood ties and 90-pound re-layer rail are used in the construction of the 1400-foot piece of track. The Southern Pacific Company uses a 90-pound rail in some of its main track, and

(Testimony of Joseph W. Williams.)

a 110-pound rail and a 130-pound rail, I believe. There is no ballast whatever. There is nothing that I would call surfacing. In this section across the Bay Shore highway some of the earth from the ground alongside has been dug up with spades and thrown [71] in between the ties, but it is not a surfaced track. The right of way for this 1400 feet of track is designated on the ground by large white posts set along the right of way boundary lines. Those posts, if I recollect it, are marked in black letters, "R. R. Property line." This right of way, as staked, extends from the Southern Pacific main line to a point approximately 3,450 feet northeasterly of the terminating point of this section of track. From the Southern Pacific main line to a point about 2,850 feet, east thereof the right of way width is 40 feet, as indicated by these stakes on the ground. From that point easterly to the termination of the right of way as marked on the ground the width is 50 feet.

A train could not be run over the 1442-foot section of track, first, because of lack of a roadbed, ballast and insufficient ties, and secondly, because the track is unconnected with main line and an engine could not get out to it.

Plaintiff's Exhibit No. 3 indicates this by a dash and two dotted lines marked in the legend "Southern Pacific Company right of way lines as staked." The figures on the plat represent the engineers' stations that are indicated on the stakes. They are in accordance with the usual practice of engineering and mark the 100-foot stations.

(Testimony of Joseph W. Williams.)

The proposed line of the Western Pacific California Railroad Company is indicated by a red line on Plaintiff's Exhibit 3. It is marked "Projected central line location Western Pacific California Railroad." There is no staked line on the ground by the Western Pacific California Railroad along the line that is marked "Projected central line location," but at a line that is shown in yellow and marked "Western Pacific California Railroad Company survey," there is a located line staked on the [72] ground. The approximate distance between the line marked "Projected line" and the line to which I have just referred is approximately 300 feet.

No attempt to surface the land upon which the track was laid was made. At points where the ground was extremely rough, however, shovels of earth were taken out to permit the laying of the track. The ground was partially smoothed across the Bay Shore highway but this could not be called surfacing. The track crosses a ditch at the place on Exhibit No. 3 marked "Drainage Ditch." This ditch is located between stations 31 and 32. No bridge or culvert crosses the ditch. The rails just span ditch. The span of the ditch is about 10 feet with no support under the rails for that distance. Very close to the Southern Pacific main line there are a few rails laid down which have a few ties. This is not really a track but it is laid at about track gauge. The track is about 100 feet long and is not attached or connected at either end.

(Testimony of Joseph W. Williams.)

This piece of track is a short distance from the Southern Pacific main line and it is about 2,500 feet from the end of this short track to the initial point of the 1442-foot section of track. This short section of track cannot be joined to Southern Pacific main track for practical operation for two reasons, first, its line of direction is approximately at right angles to Southern Pacific main line and is so close thereto that there is not room between the westerly end of this detached piece of track and the main line to put in the necessary curve and switch to make a turn-out from the main line.

The survey stakes for this line start in the vicinity of the Southern Pacific's main line and they go about 3,450 feet northeasterly of the end of the piece of track to the immediate vicinity of the approach to the toll bridge. [73]

On Plaintiff's Exhibit 1 San Mateo Point is shown. It is on an extension of the boundary line between Burlingame and San Mateo. The territory about and particularly to the east of the Bay Shore highway between a line drawn through San Mateo Point and a line drawn through the San Francisco Bay Toll Bridge was at one time marsh land. It is not now submerged except at extraordinary high tides and then only to a slight extent. It is land that is practically available at this time for industrial development.

I am referring to the land between the Bay Shore highway and the shore of the bay, to the east thereof from San Mateo Point to the approach to the San

(Testimony of Joseph W. Williams.)

Francisco Bay Toll Bridge. Easterly of the shore of the bay there is a great area of land now submerged that can be reclaimed by the construction of a bulkhead along the channel line and the filling in of that area. The bulkhead line has not as yet been established by the United States in that vicinity, but it unquestionably will be established well out from the shore, and presumably somewhere in the vicinity of the westerly channel line. The area east of the Bay Shore highway between South San Francisco and Steinberg Creek, which is at the point I am indicating here and is marked on the map "Steinberg Creek," that is now available for use; in other words, these areas that are ashore or reclaimed would be approximately 7,520 acres. The area east of the Bay Shore highway, between Steinberg Creek and Redwood Creek, that would be available with some reclamation; that is this area that is indicated as southerly and westerly of the Bay Shore, and would be 3,300 acres. The total area east of the Bay Shore highway between South San Francisco and Redwood Creek and west of the probable location of a bulkhead line along the westerly side of the deep water channel that will ultimately be available for industrial purposes, would be [74] approximately 23,300 acres. The area from the Bay Shore highway including the submerged area out to the probable location of the bulkhead from South San Francisco to San Mateo Point is approximately 7,700 acres, and from San Mateo Point to the southerly city limits of San

(Testimony of Joseph W. Williams.)

Mateo extended the area is approximately 2,600 acres. From the southerly city limits of San Mateo extended northeasterly to Belmont Slough (marked O'Neill Creek on Exhibit No. 1) the area is approximately 5,000 acres. From Belmont Slough to Steinberg Creek the area is approximately 2,000 acres, and from Steinberg Creek to Redwood Creek about 6,000 acres. Of the territory that I have indicated nothing can be served by the track as it is, but if it were completed and connected up with the Southern Pacific's main line and extended on out to San Francisco Bay Toll Bridge, as is indicated by the survey stakes on the ground, it would serve from that immediate section of track all of the Emma Rose property, and the property to the south belonging to the Leslie Salt Company. By a very easy extension of this line—and when I say "very easy" I mean from a practical railroad extension of this line northerly, it could readily serve all of the territory up to San Mateo Point, and I see no reason why it could not be extended to serve this entire area now reclaimed and that may be reclaimed in the future, up to South San Francisco; likewise, to the south, it could be extended along substantially the same lines as the proposed Western Pacific California Railroad Company line to serve this area down as far as Redwood Creek.

The reason for serving the territory the way I have outlined rather than by serving it by short spurs thrown out from the Southern Pacific Line between San Francisco and Los Angeles from an engineer-

(Testimony of Joseph W. Williams.)

ing point or view is that such manner would obviate the necessity of crossing the Bay Shore Highway at other points and also of crossing the line of the Western Pacific California Railroad Company. To extend the line of which this 1400 feet constituted a part to the north, it will have to [75] cross the San Francisco Bay Toll Bridge highway.

On Cross-examination by Mr. DURBROW.

South of Fifth Avenue in the city of San Mateo the Bay Shore highway is located on the ground and is not graded, paved or constructed. It is a surveyed located right only. When I have spoken of the Bay Shore highway I have referred to the located center line of that highway.

In a general way the red line upon Plaintiff's Exhibit 1 shows the route proposed by the Western Pacific California Railroad Company accurately. It does not show in detail. The line delineated on our Exhibit 3 which says "Western Pacific California Railroad Company survey" is a line of location that was actually staked on the ground on August 20, 1928. I might add that a preliminary line in that particular section was run on July 19, 1928. Then we projected a location from that preliminary line and that is the line that is staked on the ground, and was so staked on August 20, 1928. The other line on Exhibit 3 which says "Projected center line location Western Pacific California Railroad" is a projected location. These lines are approximately 300 feet apart. The projected location came

(Testimony of Joseph W. Williams.)

about because some of the property owners in the vicinity of the location of our line objected to the location that we selected. They felt this location damaged their property more than necessary, so we altered that location by projecting a location on the map from our notes, which is common engineering practice. This is the location shown in red on Exhibit 3, which is marked "Western Pacific California Railroad Company Projected Location." It is not staked on the ground. It is upon this latter location that we proposed to construct our railroad if permitted to do so by the Interstate Commerce Commission. [76]

It is customary in laying out a railroad or the proposed location of a railroad to shift their locations 300 feet as I have indicated. It is a common practice and it is customary to do such things without making a detailed survey and staking the ground. I do not recall that we have departed from the line shown on Exhibit 1 in any substantial manner anywhere. I would call 300 feet a substantial manner, but this exhibit was used in the hearing in January, 1929, and this projected location was made sometime prior to November, 1928; that is, the location this projected location across the Emma Rose property is the location that is indicated on Exhibit No. 1. The red line shown on our Exhibit No. 1 is a general proposed location of the Western Pacific California Railroad Company as originally projected. I would call it our definite location, the location on which we propose to construct if we get

(Testimony of Joseph W. Williams.)

a permit from the I. C. C. Our original location, Mr. Durbrow is the one that is staked on the ground. That is a variation of 300 feet. This line shown on Exhibit No. 1 is approximately an actual portrayal of the line projected by the Western Pacific, but it does vary some 300 feet from a line at one time conceived of. It varies at other points from the original line. In South San Francisco the original line that we located at South San Francisco varied quite materially from the line that we finally projected after conference with the property owners. That was all clearly explained and outlined in our hearing before the I. C. C. In general it is not correct to state that from where our proposed line takes off at Islais Creek to the vicinity of Redwood City that it varies materially from the line originally staked. In particular sections there is a material variation. On the Emma Rose estate there is a variation of 300 feet, which is substantial, and in South San Francisco there is another substantial variation. [77]

The line marked by me on Exhibit 3 "Western Pacific California Railroad Company Survey" was actually staked on August 20, 1928, and our other line, projected center line location, Western Pacific Railroad, was projected sometime prior to November 10, 1928. I cannot determine when that line was projected exactly, but I think that I can determine it within a period of a few days.

With regard to the location of the 1442-foot track on the right of way, the track from its westerly end

(Testimony of Joseph W. Williams.)

to a point about 35 feet westerly of the easterly right of way line from the Bay Shore highway is located approximately 10 feet from the northerly boundary line of the right of way. From that point on it is located approximately 18 feet south of the northerly right of way line, consequently, 32 feet north of the southerly right of way line.

On being recalled Mr. Williams testified: This projected line was actually accomplished some time between the 21st of October and the 10th of November. I should say that it would be the 25th or 26th of October, or in that general range of time.

Statement of Mr. Williams at page 73 of transcript: The United States Coast & Geodetic Survey chart of San Francisco Bay shows the channel opposite Point San Mateo. It is approximately 3,000 yards from the westerly side of the channel to Point San Mateo. The depth of the channel at the place opposite Point San Mateo is 48 feet. By dredging, the depth of water could be brought in closer to what is now solid land. It is about 9,000 feet from the easterly boundary of the Rose estate to the channel. At this place the channel is about eight fathoms deep or 48 feet. The channel varies from a minimum of 6½ fathoms to a maximum of 9 fathoms.

It is the intention of plaintiff to serve the territory indicated in Exhibit 1 between San Mateo Point and the southern [78] limits of the city of San Mateo and Brewers Island and points north

(Testimony of Joseph W. Williams.)

and south with general freight service including industrial tracks.

It was stipulated by counsel at this time that a series of photographs of the partially constructed piece of track could be introduced in evidence by the plaintiff. They were introduced in evidence and marked Plaintiff's Exhibit 4.

(Original exhibit transmitted to the Circuit Court of Appeals by order of the District Court.)

TESTIMONY OF F. L. BURCKHALTER, FOR PLAINTIFF.

Mr. F. L. BURCKHALTER, a witness called by the plaintiff, being first duly sworn by the master testified as follows:

On Direct Examination by Mr. MANNON.

I am and have been since January 1st of this year general manager of the Southern Pacific Company. From June, 1925, until January 1st of this year I was first assistant manager.

During the time I was assistant general manager and also since I have been general manager I have had to do with the tracks in San Mateo County, California. I am conversant with the fact that some 1400 odd feet were constructed on a Saturday afternoon and Sunday and perhaps the succeeding day in San Mateo County. I have no personal knowledge of the reason for commencing construction Saturday afternoon. It was undertaken without my knowledge or direction. The construction

(Testimony of F. L. Burckhalter.)

was ordered by Mr. Kirkbride, our engineer of maintenance of way and structures. I had to do with the original plans of the track, and recommended the original plans and the revisions thereof, and recommended the expenditure, but I had nothing to do with the actual construction of the track. I had nothing to do with giving any directions for the construction of the track.

The expenditure was authorized by the then general manager, Mr. Dyer. I had recommended it to him along with other officers of the company. The authority for the expenditure was [79] given by Mr. Dyer. I have the written authority with me. I have photographic reproductions of them. This is the first authority, approved April 29, 1926. It calls for the expenditure of $51,051, which includes the value of the donated right of way, and deducting that value, which is $21,640, it leaves a net investment of $30,331, or leaves a net cost of $30,331. This is authority No. 68,280, dated January 4, 1926, and approved April 29, 1926, issuing authority to build 5,475 feet of second-hand 90-pound track; the track now proposed will serve about 36 acres of industrial property; and the tracks proposed under future plans will serve an unlimited territory extending clear to the bay; location of track will take off the San Mateo yard tracks and leave our existing right of way at a point 2,780 feet east of the station. I think that will identify it. That is the first authority that deals

(Testimony of F. L. Burckhalter.)

with the construction of industrial trackage to serve the Emma Rose property.

The second authority is a revision of the first one, and carries the same number. It was dated November 10, 1927, and approved February 23, 1928. It is for an amount of gross $78,640, with a credit for donations of $21,640, estimated gross cost of project less the donations $57,240. This covers the construction of 5,475 feet of 90-pound drill track. No, I am mistaken about that. That is the reference to the original. This provides for the construction of 3,850 feet of drill track parallel to and on the bay side of the main track, and for 4,160 feet of drill track extending toward the bay to serve the property. That is the Emma Rose property. The Rose Estate will donate a 50-foot strip of right of way for ultimate extension of this track and assist in procuring other rights of way.

The third authority, being a second revision of the original authority, is also numbered 68,280, and is dated August 6, 1928, and approved September 13, 1928. This says, in [80] part, "It is now proposed to construct 1,960 feet of track parallel to the main and 8,200 feet of track extending toward bay to serve the property for its entire width." That refers to the Emma Rose property.

The original and the two revisions are all the authority on this project. According to the last revision the total amount is $87,260, less credit for donations $15,630, leaving net cost to the railroad company, $73,160.

(Testimony of F. L. Burckhalter.)

Note: Photostatic reproductions of these documents with maps attached were received as Plaintiff's Exhibit 5. (Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

These authorities for expenditure cover this particular track as built, or rather the last one does, at least. I meant to say by that after the construction proceeded under the last authority. The construction work was done in accordance with the authority. The map (attached to the last authority, Plaintiff's Exhibit 5) identified as M. W. D., Drawing No. 6152, shows the entire proposed construction by the red line. It does not show the part of the track that has been built. The line indicated in red on the blue-print is the line that I have in mind, that being the authority for the track of which the 1,400 feet constitutes a part.

The construction of the track is within my department, but I have nothing to do with it personally. I did not order its construction. I authorized it only by transmitting the authority. When we ask for an appropriation to undertake a project and get it then that authority is issued to those concerned, and they are at liberty to proceed with the work as soon as the appropriation is granted. This authority was issued by the then general manager, Mr. Dyer, and would go to all concerned, as we might put it. It would go to the division superintendent, to Mr. Kirkbride, and [81] others. It is an authority to proceed. Mr. Kirkbride gets

(Testimony of F. L. Burckhalter.)

copies of those authorities; and the division superintendent, and the assistant general manager; the auditor gets a copy; the storekeeper gets a copy; also various other departments. The work of construction of trackage is ordinarily done by the division superintendent under such directions as may be given by Mr. Kirkbride, as to track details, and anybody else may give some special instructions; but all ordinary projects are handled by the division superintendent. In this particular instance, Mr. Anthony was the division superintendent. He was in charge of the work on his division, but he was subject to the receipt of instructions from any of his superior officers, such, for instance, as Mr. Kirkbride. It was Mr. Anthony's duty to proceed. He is still with the railroad. In this case I believe Mr. Kirkbride directed the handling of the work. It was not an unusual thing for our engineer of maintenance of way to handle this work. It is a thing he has been handling for a good many years, because of the numerous complications that prevailed in this matter. He personally handled many of the negotiations and took a personal interest in it, so it was quite natural for him to follow it up. I am familiar with the project as covered by these authorities for expenditure. The trackage to be constructed is 8,200 feet long, commencing from the point of departure, from close to our main track out to the far end. There is a red line indicating a track to be built parallel with the main track, which is 1,960 feet long, which extends from a point

(Testimony of F. L. Burckhalter.)

about opposite Thirteenth Street to a point somewhat below Tulip Street. That is upon the Southern Pacific's right of way. The line of curve, however, is not the track right of way of the Southern Pacific. The curved track leaves our right of way almost immediately that it takes the curvature, and thereupon goes over newly acquired right of way around the curve and on out to the end. I am not sure [82] that deeds granting the Southern Pacific a right of way along that curve have passed, but we have negotiated for it and I believe the deed is in escrow now. My authority for that statement is my knowledge that it is in escrow and the fact that I signed the agreement the other day which gave the salt company rights to build certain road crossings over this right of way. In that connection, it was mentioned that the papers were now in escrow.

The property shown on the map attached to Plaintiff's Exhibit 5 over to the end of the red line is the property of the Emma Rose estate. The outer end of the red line is co-incident with the limits of the Emma Rose property. All of the property shown to the north of the red line on the map attached to the last authority for expenditure is not Emma Rose property. There is other property shown to the north. I do not know who owns it. I know that the Rose people do not own beyond this red line. The property to the north of the red line, so far as the line itself is indicated on the map is all property of the Emma Rose estate. That

estate extends northerly a considerable distance from the portion of the red line lying substantially parallel to this line marked "San Mateo City Limits Line."

At the present time no industries of any kind are located on the Emma Rose property. Going straight out to the bay from the end of the Emma Rose property extending north as far as San Mateo Point, I know of no industries in there at the present time. Very generally I am familiar with the property. Extending southerly between San Mateo point and where the San Francisco Bay Toll Bridge is, I do not know of any industries located in there at all except a few right in San Mateo proper along our main line of railroad. There are no industries on the Rose tract along the main line of the Southern Pacific leading from San Francisco to Los Angeles. I know of no industries on the Rose properties or east thereof as far as the bay. I know of no industries as far [83] north as San Mateo Point. Along the territory to the east of the Western Pacific California Railroad line as shown on Plaintiff's Exhibit No. 1, the first industry you come to going on the Rose property is in South San Francisco. Going southerly along that same line from the Rose property the first industry you come to now in existence, I believe, is in Redwood City. I am referring all the while now to the area easterly of the projected line of the Western Pacific.

I don't know whether I ever saw Exhibit No. 85

(Testimony of F. L. Burckhalter.)

which was introduced at the hearing before the Interstate Commerce Commission and now contained in Plaintiff's Exhibit No. 2. I attended part of the hearing before the Commission but not all of it. I can say that I know of no industries in the area covered by this exhibit located to the easterly of that Bay Shore highway and in the vicinity of San Mateo Point. I think maybe your question was a little too broad to cover the situation at Redwood City. There are other industries than the cement plant at Redwood City. I know of no industries easterly of the projected Bay Shore highway on Exhibit 85. I initialed the original authority for expenditure covering the particular track under discussion, the one dated January 4, 1926. I also initialed the first revision, but the last revision does not carry my initial, at least I don't see it. I have had to do with this project since its inception. As I have said, I did not initiate that construction, and I think Mr. Kirkbride should tell about it, because anything I may know would only be hearsay. I have nothing to do with the construction of it at all. I am familiar with the detail of the track or what kind of a track it is because that is covered in the estimate. I have not received any reports as to the material entering into the actual construction. The authority for expenditure details the material. It gives the weight of the rail, the ties, etc. And apart from [84] what is shown in the authority for expenditure, I am not familiar with it. That is the usual

(Testimony of F. L. Burckhalter.)

weight of rail used in this character of trackage, that is, sidings, spurs, and industrial tracks we are using generally anywhere on our main line 90-pound re-layer rail. That is specified in detail in this authority for expenditure. It shows here on sheet 3, "442 tons of second-hand 90-pound rail."

With regard to its possible development, the Emma Rose estate is industrial property. All of that property along the channel is also potential industrial property in a less restricted sense; that is, I mean that the property outside of the Emma Rose property will probably not be developed until after the Emma Rose property is developed. The property between our tracks and the channel is in the main industrial property potentially from about Eleventh Street down to opposite 16th Street; north of about Eleventh Street the property shows some residential development. It is very thin, however. As you go north there is considerable residential development. North of about Tenth Street the residential development lies comparatively close to the Southern Pacific tracks. The property to the east of that residential development and extending out to the channel is what you might class as potential industrial property. If I may, I would like to say that the Emma Rose property, southerly from Eleventh Street, is entirely vacant, and has had no development whatsoever. North of Eleventh Street it has heretofore been subdivided, and a good deal of it has been sold off for residential purposes. There is very little of the property

(Testimony of F. L. Burckhalter.)

given up to residential purposes, however, south of Tenth Street. I don't recall at the moment what the property east of Bay View Boulevard and about opposite Fifth Street may be used for. I don't think that is residential property. The map I have just referred to [85] is entitled "Second map of East San Mateo Lands, property of Emma Rose, San Mateo, Cal." This map was received and marked "Plaintiff's Exhibit 6.

I don't think I have seen this piece of 1400-foot track. I don't recall having been by there since it was built, that is, except on the main line. I know about where the San Francisco Bay Toll Bridge is. The line which is projected in red on the map which accompanied the authority for expenditure extends across the San Francisco Bay Toll Bridge road. I do not know how far beyond but it must be 300 or 400 feet, perhaps. I would like to ascertain that and give it to you accurately.

The service that we propose over this line in red is industrial switching service. By that I mean the operation of locomotives to back up and set in cars needed by industries. If there were industries up at San Mateo Point they would not affect the use of this road in any way. This track will not reach that point, and it is not proposed to extend it at all in that direction. We have no plans at this time for serving the property that commences with the end of the track on the authority for expenditure and that extends from there to San Mateo point. I have not heard of extending

(Testimony of F. L. Burckhalter.)

any tracks there, excepting that we have always offered to develop industrial areas anywhere along our line, here or anywhere else, but there has been nothing definite about it. We stand ready everywhere along our railroad to encourage industrial development by the building of industrial switching tracks. We have done it from one end of the railroad to the other. Our common procedure is to lay down the track at the entire expense of the railroad, that is, the industrial switch track, if the owner of the property which is being developed will contribute the right of way. Thereafter, the individual industries which will locate will join in the expense of individual [86] spur-tracks serving a particular industry on what we call the usual industrial terms, whereby the railroad stands the cost of the switch and the terminal to the clear point, which is about 150 feet, and then the industrial pays the entire cost of the track beyond the clear point. That is our usual way of putting in industrial tracks all over the system. We have built a great many tracks in locations where there are no industries. I mean we have built a great many tracks such as these. Ever since my connection with the property I have know of numerous cases where we have built industrial tracks on the terms I have discussed, namely, at the entire expense of the railroad on the contribution of the right of way by the owner of the industrial area, in the hope that we would thereby bring track and ground together and lay the foundation for an industrial

(Testimony of F. L. Burckhalter.)

development. If we should wait until an industry actually wanted the ground it would take too long to get the track in. So when a man decides that he wishes to make certain attractive land into industrial property, and the prospects look good for selling the property off as industrial property, we go into partnership with him, as it were, by contributing the track. We are willing to lay that down even before the first industry is in sight when, in our judgment, the area under construction is a good potential industrial property.

I do not know whether the Emma Rose deed provides that this particular track is not to be used for the loading or the unloading of cars. We would not use this track for loading and unloading cars. It is a work track. The industries to be served will be immediately adjacent to this right of way, but they will take their service from a short spur-track, just as short as they can get along with, building out from these industrial switch tracks, that the authority for expenditures covers. Until we locate the industries the location and the extent of [87] those individual industrial spur-tracks must await definite plans of the industries that may locate there. If the industries were to locate immediately at the easterly end of that track we would serve those industries. We will serve an industry any time any place that we can get hold of one. We will serve it over this track that in indicated on this authority for expenditure. If an industry would offer to give us some business right to the

(Testimony of F. L. Burckhalter.)
end of this track we would swing a spur out of it just as we would swing a spur out from the middle of the track or down toward the westerly end of it. We would not do it by the extension of this track, but we would put in a switch to serve property near the end, as we would anywhere else along the route. If it was convenient and necessary to extend that track to serve two industries at the outer end thereof we would do so, at least, I would ask for the money to do so. If you imagine an industry developed at the end of the track, and another one just beyond that, and another one just beyond that, etc., etc., a chain of industries, then the track would be extended out to serve that chain of industries. I think, however, it is a pretty broad statement to say that we would reach whatever industries that might be within convenient reach of it. There is some limit as to how far this track may go. There are practical limits. It is a very hypothetical question you are asking as to what those limits are. I would say, as a practical matter, that industries will not locate away out beyond the end of the track if they can acquire a site closer in and adjacent to the existing track. It is not common for industries to locate away out beyond any other industries. Industries generally grow from close to the city outward, they do not start away out and grow in. That would be quite an unnatural thing, I think, for an industry to locate away out at the end of that track. I would not say that it would be an unnatural thing for an industry to locate out here if

(Testimony of E. L. Burckhalter.)

that [88] industry were one seeking a terminal at deep water, although it is not my general impression that that is a particularly favorable place for a deep water industry. I do not know whether or not that territory has been considered for development of that character. I have no knowledge of such negotiation with our railroad along that line. This does not apply to all of the territory south of San Mateo Point and extending to Redwood City. We had some negotiations with the people who were planning this Port San Francisco development. That is shown on that Exhibit 85 that we were looking at a while ago. That development is outlined on Exhibit 85. It is a little south of Beresford—about opposite Belmont. If the physical conditions are favorable I would not see anything unreasonable about a similar development south of San Mateo Point along the bay shore and extending to the channel. I don't know of any such development being planned now.

The plan we contemplated in the quotation from the first authority for expenditure "Property served, tracks now proposed will serve about 36 acres of industrial property and tracks proposed under future plans will serve an unlimited territory extending clear to the bay," meant that we would serve the territory clear to the bay. The plan accompanying the first authority for expenditure authorized the construction of a track extending but a short distance easterly of Bay View Boulevard, and contemplated the donation of an industrial

(Testimony of F. L. Burckhalter.)

switching track right of way on the part of the Rose Estate through their property, and also for a very considerable distance beyond the line of the Rose Estate, which occasions the reference to development further on out into the bay. In the revision of the plans as covered by the later authorities, the right of way was confined exclusively to the Rose Estate properties, and did not go beyond their line, which is approximately, I believe, the line between section 21 and 22. Referring to the plat accompanying the first authority for [89] expenditure with respect to the question of how far east we proposed to build that track, there seems to be a break in the line indicating the distance. I dont know how far it is. There seems to be a distance marked on there but I cannot read it. I will take this closer to the light and see if I can make out the figure there. It looks to be like 10,100 feet. I will ascertain what that is. That is to say, 10,100 feet beyond the point marked "Top of levee," which is beyond the Rose property. This break is just a case of the end not falling on this size of paper and they brought the end in and introduced a break, making the total length; in other words, it is just foreshortened by the amount of the break.

I know of no plans by our company to serve the property of the San Mateo Docks Company. If there were such plans, I am pretty sure I would know of them. I don't see all the plans. I miss a few once in a while.

"Mr. MANNON.—The present authority for ex-

(Testimony of F. L. Burckhalter.)

penditure, however, is limited to the Rose property, is it not?

Mr. BURCKHALTER.—Yes, it is.

Mr. MANNON.—If you wanted merely to serve the Rose property this track that you have described would you extend across the San Francisco Bay Bridge Highway?

Mr. BURCKHALTER.—Yes.

Mr. MANNON.—And clear to the limit of the property?

Mr. BURCKHALTER.—Yes.

Mr. MANNON.—What would be the necessity for that, to serve the Rose property?

Mr. BURCKHALTER.—To reach the property lying northerly of the highway, that is to say, the Bridge Highway.

Mr. MANNON.—Q. As I understand it, according to the provisions of this document, you are required to build only up to that Bridge Highway, are you not?

Mr. BURCKHALTER.—A. Yes.

Mr. MANNON.—Q. I call your attention to this part of it; 'That Grantee shall construct, at its sole cost and expense, and have ready for operation within six months from the date hereof a single railroad track upon parcels numbers 1 and 2 hereinabove described, connecting with the main track of the Grantee near Leslie Station, San Mateo County, California, and extending from the connection with said main track in a Northeasterly direction to the Southwesterly boundary of the San Fran-

(Testimony of F. L. Burckhalter.)

cisco Bay Toll Bridge Company's right of way.' So that the Rose estate only requested that you build up to that road. Now, you are going to cross the road. I will ask you again what you propose to serve across the road?

Mr. BURCKHALTER.—Industries on the Rose property lying northerly of the road." [90]

According to the provisions of a deed from Emma Rose and husband to the Southern Pacific Railroad Company dated March 18, 1929, granting the right of way for the track under discussion, which deed was received as Plaintiff's Exhibit No. 7, we are required to build only up to that bridge highway. The provision referred to is as follows:

> "That grantee shall construct, at its sole cost and expense, and have ready for operation within six months from the date hereof a single railroad track upon parcels numbers 1 and 2 hereinabove described, connecting with the main track of the grantee near Leslie Station, San Mateo County, California, and extending from the connection with said main track in a northeasterly direction to the southwesterly boundary of the San Francisco Bay Tollbridge Company's right of way."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

We would serve across the road industries on the Rose property lying northerly of the road. There is nothing sacred about industries on the Rose property. We serve industries on other properties. If

industries instead of being on the north end of the track are to the south of it, we would still serve them over the track in question if they are closely adjacent thereto.

We do not propose to cross the Bay Shore highway with frequency as far as industrial tracks are concerned. In this connection I don't think I could define frequently. That would depend a good deal on conditions. We would make an endeavor not to cross that highway from our main tracks or the proposed road of the plaintiff here any more frequently than we could avoid. That would lead us to use this track which we are proposing to build across the Rose property for as much territory adjacent to the bay and adjacent to the Rose property as we could reasonably do rather than cross the proposed Bay Shore highway at another point. I could not say that it would be true that our desire to avoid crossing the Bay Shore highway at another place might [91] easily take us up as far as San Mateo Point if there were industries there—I mean by the road that starts across the Rose property. It might be. I don't think it might take us further north for the reason that in a very general way I think that there might be a crossing above San Mateo Point to serve any development that might come there, and that the track would be extended southerly from such a crossing if and when there is industrial development that will require it. It would be our expectation to have some variety of a spur northerly of San Mateo which might extend

into the property north of San Mateo Point, if and when industrial development would require it. I regard that property as potential industrial property. As to the property which lies south of the east and west line which runs say through the easterly terminus of this line projected through the Rose property, I believe we would also turn that line to the south if industries offered immediately to the south, and would have those industries served over this track.

I don't know the property known as Brewers Island except in a very general way. I am not familiar with the name or the limits of ownership. As far as I know our company has not been consulted with regard to supplying railroad service for that land. It might have been without my knowledge. The track that we are discussing (the Rose track) might be turned to the right and serve the property along Brewers Island. It might also be done by crossing the highway, depending upon the extent of the development and the way it took place, and many other factors. As the industries develop to the south we would, in time, expect to serve them over this extension or spur that runs over the Rose property, if it were the most convenient and economical way of doing it. One of the factors which we would take into consideration in determining whether we would use this track would be a consideration of whether we had to cross the Bay Shore highway too [92] frequently. This would be an important factor. By saying what would be economical there to do and

(Testimony of F. L. Burckhalter.)

what would not be, I am referring to whether it would be cheaper really to serve the industries which might locate out in that territory along the bay over this Rose tract track or over some other track. If it became necessary to cross highways and there had to be a separation of grades that would become an extensive thing. The cost of crossing the highway would tend to, other things being equal, extend the limits of this track northerly and southerly. Whether we would expect to cross the Bay Shore highway in preference to extending this track further north or further south would depend on cost of construction, maintenance and operation, and these factors are awaiting development. In order to find out just what traffic we are going to have move over the Rose property on this track that we are talking about, we will have to wait until we see what industrial development there is out beyond it. When that industrial development occurs then we will meet it with whatever trackage is necessary in the most convenient and economical way. I could not now say just what the limits would be that might or might not be served by this Rose track. I think it is all speculative.

As to a definite area of property and a definite owner of property where the owner intends to put his property on the market for industrial development, we have to lay out tracks first and then the industries follow. That is such a piece of property as Mrs. Emma Rose has. She or her manager have determined that they are going to sell this property for industrial purposes. It is a very fine piece of

(Testimony of F. L. Burckhalter.)

property for such purposes, and we have undertaken to contribute to that development. I have no knowledge that the other people who own property adjacent to the Rose tract and to the north, east and south, are extending to market their property. It is not my job to get that knowledge. [93] The industrial department develops those things. I do not think that property is identically of the same character as the Rose property. I think it is lower land. There may be some within the same levees. I have no personal knowledge as to whether the Rose property was originally marsh land entirely. I don't know that it was not or that it was.

I know nothing about this short piece of track—100 feet—that was laid close to Leslie Station at right angles there. I don't recall particularly having noticed it or having anybody make any reports to me about it. The track that is supposed to be laid on the Rose estate right of way is to be laid off-center, as we say. The print accompanying the authority for expenditure shows that the track will be 20 feet southerly of the northerly line and 30 feet northerly of the southerly right of way line. That is on the westerly end. It seems to continue all the way along. The right of way seems to be 50 feet on this print. I don't know the purpose of having the track off-center, except that the Emma Rose people wished 60 feet left for a street on the westerly end of the track. I am unable to account for that. If it was for the purpose of leaving room for another track it is a very good idea to leave

(Testimony of F. L. Burckhalter.)

room for a second track for storage purposes. You would never need more than one running track, so that if a second track were built it would necessarily be for storage, or for a drill track, as we say, to the industries that may locate along this right of way. I say that we would need only a single running track because I cannot imagine the business getting heavy enough to require two main tracks or two open tracks.

The right of way will be fenced on both sides and the track will be filled to a proper grade. The track as laid does not represent the grade at which the completed track will be. The track will be ballasted, but not with soft adobe alongside. There is no ballasting or surfacing at all on the track according [94] to what I heard this morning from Colonel Williams, but I have no knowledge on this subject.

We don't propose to load or unload cars from this track nor do we propose to store cars on it.

Assuming that we build up as far as San Mateo Point with this track, that would be quite a distance past the end of this Rose property. I am unable to state how far without looking it up. If industries were located up here and communities grew up about the industries, we would not expect to give the communities whatever service they might require. If they required passenger service, for example, and express and mail service, we would not expect to give it over this track. We would not expect to give less than carload service either. We

(Testimony of F. L. Burckhalter.)

only expect to give industrial switching service over this track. If we had no other track in the same community which might establish itself in the near future around San Mateo Point I would not expect to give that community general railroad service. I would not expect to give them passenger service, mail service, or express service, and I consider it extremely doubtful if they would want or would receive less than carload freight service. It is a fact in a broad way that the law obligates a carrier to furnish such service if demand were made for it, but we are not required to give passenger service, or mail service, or express service over industrial switching tracks. We are only required to do that over main line tracks, where that operation would be feasible. I cannot imagine this track being operated for a passenger train. Even if there would be a considerable growth and an increase in population in due course of time we could not respond to a demand for such service in my opinion over this 8,000 feet of spur-track, because it would be a very clumsy operating arrangement. I don't think anybody would ask for it or would want it. No storage track for the storage of cars in connection with this 8,200 feet of construction has been [95] authorized and none planned so far as I know. I think an assembly track as you are thinking of it is probably the same thing as a storage track, isn't it? We would naturally not build what might be called auxiliary trackage to this initial open track until there is a need for it. If there was need for such trackage

(Testimony of F. L. Burckhalter.)

we would expect to build it. We expect to give service to any industries that may locate on the Rose property, and build such storage tracks and industrial spur-tracks as may be necessary, as the development takes place.

Our expectation is that the track will serve industries that may develop on the Emma Rose property. We do not look for any industrial development outside of the Emma Rose property for a long time to come. If there is industrial development, however, on other properties, we would expect to serve the adjacent properties industrially over this track if that proved to be a convenient and economical way of doing so.

The track will be operated by a switching crew which would naturally be the local freight crew, until such time as the business got heavy enough to warrant the assignment of a special switch-engine. The movements will be switching movements. The trains or cars or engines will go on and off at the junction of the industrial switching track with the track to be constructed parallel with the main track, which junction is on the Southern Pacific right of way about opposite Tulip Street. On the other end, going out the other way, they would not go off this track.

Cars will be loaded on the industrial tracks to be built by the industries located on the property. The number of spurs taking off of this track on the Emma Rose property depends altogether on the number of industries which may locate there, and

(Testimony of F. L. Burckhalter.)

what their track requirements may be. The method of operation with regard to these plants will be to haul cars from our main track over this track that we contemplate, and then [96] these cars will be switched from this track that we now contemplate building to the industries. The service to all industries will be switching service. By a switching service I mean service performed by a locomotive and a crew shifting cars in and out of tracks as distinguished from an operation over a main track where the crews operate by time-table and train orders. Whatever length this track may be extended I cannot contemplate any other kind of service than switching service. I think the track will not be extended so that it will have separate stations there. I think the existing stations on our line between San Francisco and Redwood City, for example, if it should be extended to those extremes, which you understand I think is not likely, would take care of the business in all instances. I think the less than carload business would be handled by the main line stations, irrespective of the number of industries which might develop.

I have no information with respect to the cost of possible extensions beyond the Rose property. I have only very general knowledge with respect to the presence of unusual obstacles to be encountered physically in laying this track over the Rose property, but there is considerable difficulty in making the turn-out across the pond of the Leslie Salt Company which adds considerable to the expense and

involves the construction of a cooling tower, the cost of which I believe is $6,500.

I did not negotiate the agreement with the manager of the Rose estate, but it is my understanding that the provision put in the deed to the Southern Pacific Company from Emma Rose with regard to the possible crossing of the Rose tract and our track by the Western Pacific California Railroad was put in at the instance of the Rose estate management. I knew that the projected line of the Western Pacific California Railroad Company might cross the Rose property. I knew also that the Bay Shore highway was projected across the Rose property, and that this projected [97] road of ours extended over the San Francisco Bay Toll Bridge highway, which is an existing highway.

We have a standard form of contract for industrial tracks.

The ordinary cost per mile for the spur-tracks which my company usually installs runs about $3 to $5 a foot, depending upon grading culverts and various local conditions. Probably they run about $4 a foot on an average. We use the foot measure as a standard in speaking of industrial spurs because they are usually short, just a few hundred feet long, and we think of them in terms of feet in talking to the industries. I do not know the weight of rail in the spur-track that is laid into the Leslie Salt Company.

(Testimony of F. L. Burckhalter.)

On Cross-examination by Mr. DURBROW.

As of January 1, this year, the actual road mileage operated by the Southern Pacific Company, Pacific Lines, that is, being the lines west of Tucumcari, New Mexico, and El Paso, Texas, Ogden, Utah, and south of Portland, Oregon, was as follows: Main line, 4,854.94 miles; branch lines, 4,032.54. Total 8,887.48 miles. Since then there have been some additions to the mileage that I do not have before me, consisting principally of the Nevada-California-Oregon Railroad, which was taken over on September 1st, this year, which is about 154 miles long. About 100 miles of that railroad would be designated as main line, and the remainder as branch. The road from San Francisco through San Mateo to a point about at Palo Alto was first operated in 1863; from that point on to San Jose the road was first operated in 1864. At that time it was a single main track, but to-day it is a double main line track between San Francisco and San Jose.

The Rose property abuts the right of way of the Southern Pacific Company for a considerable distance. Referring to Exhibit 6 in this case, I figure that the distance from the southerly line of the property to the lots indicated in red, [98] north of Eleventh Street, which have been sold off, is 1907 feet; in other words, there is an abutting frontage of 1907 feet in that area. Further north there are odd parcels that are immediately adjacent to our property, except that there is a street desig-

(Testimony of F. L. Burckhalter.)

nated as "Railroad" which was originally, I understand, part of the Rose Estate, but has been dedicated as a street. The property abutting the Southern Pacific's main line is available for and suitable to industrial purposes. All of the Rose property is suitable for the location of industries, excepting small areas of low ground and sloughs which will require filling. All of this spur-track or industrial switching track is located within the city of San Mateo, and from the point at which it extends from our main line, it is all on the Emma Rose property, excepting a very small piece that crosses the corner of the Leslie Salt Works. There would be 1,960 feet of track on the Southern Pacific right of way and parallel to the main track, and then there will be just a very small piece of the diverging spur that goes out into the Rose property on the right of way, probably not over 100 feet. The track on the Rose property, including the portion on the Leslie property, is 8,200 feet long.

It is proposed to extend this track upon the Rose property to the southerly line of the toll bridge road for the sole and exclusive purpose of developing an industrial area upon the Rose property.

The country to the north and east of this toll bridge road is marsh land and water principally on the east, and to the north of the Rose property, and it is not at all as suitable for industrial developr as the Emma Rose property because it requires filling in before it would be equally as useful as the Rose property. There is not any possibility of de-

veloping that property for industrial purposes in the immediate future. There are other available tracts of land, large acreages of high land that is [99] above the marsh lands up and down the Peninsula at various places along our main line right of way upon which industries may be located.

The proposed spur-track will be used exclusively for switching purposes. No less-than-carload business will be handled over it, no passenger trains will be run over it, and no trains or engines will be operated over it under time-card or schedule. Upon completion of the track the switching should for economical reasons first be done by the local freight crew that does the switching at San Mateo now. Should the business get heavy enough, that is, the switching business get heavy enough at San Mateo and vicinity, then a specially assigned switch engine would be put on. The billing will be taken care of at the station at San Mateo. No agent will be located at any point on the track; there will be no telegraph lines extended along this track; and no freight sheds or station buildings at all located on this track. The operation of engines and trains over this track will be the same as is usually performed in the yard. The engines will move as switching engines under yard rules, which means that they will move without time-table authority or train orders, but will move under control and keep out of the way of one another when there is more than one engine, and should there be more than one engine on the track. The operation over this track

(Testimony of F. L. Burckhalter.)

will be the same as is usually performed in switching carload freight to and from industries at other points on the Southern Pacific Company's lines.

On Redirect Examination by Mr. MANNON.

If I said yesterday that the line which we proposed to build might extend across the San Francisco Bay Toll Bridge highway, I was mistaken, because while we have authority to build, or, rather, while we have the appropriation to build across the toll bridge highway, our agreement with the Emma Rose management is that we shall build up to the southerly line of that road, and [100] that is as far as we now intend to build. While I think I made the general statement yesterday that the issuance of an authority is the order to proceed, in this case the instructions are that we will only build to the crossing to the road of the toll bridge. The agreement, as we all know, provides that the track will be built to the southerly line of the toll bridge road. We cannot build across the road without permission from the California Railroad Commission, a franchise from the county, and various such preliminaries that have to be handled. I could not say whether those instructions are in writing, or only verbal from Mr. Kirkbride.

When our company builds improvements the instructions are not always in writing. Usually we get authority for an entire project, in fact our instructions are that we must ask for authority for the entire project, but we may not immediately avail

(Testimony of F. L. Burckhalter.)

ourselves of all that authority. It is within the province of the division officers and other officers of the company to expend the money appropriated as may be necessary. Circumstances vary. Some of our authorities are manifestly such as, for example, an industry track wanted by a particular industry, when that authority issues the track is immediately built if the industry wishes to proceed, subject, however, to shortening the track if they so desire upon later consideration.

The delivery of the authority for expenditure was an order to construct the track in this particular case because we were under agreement with the Emma Rose Estate to do so. The officers of the company have been anxious to build this track and upon receipt of the authority undertook to do so. I took no action in the matter after the authority was approved. The authority was issued to the superintendent and other officers, whereupon Mr. Kirkbride took the matter in hand and directed the work of construction. I have given no orders for the construction of this track. [101]

The matter was discussed among ourselves and was generally understood that we would only build that much of the track required by our agreement with the Rose Estate at this time. Mr. Kirkbride could not build across the road without bringing the matter to my attention, because I must handle applications to the California Railroad Commission for crossing highways. They require my personal signature.

(Testimony of F. L. Burckhalter.)

Mr. Kirkbride, in handling the matter, is working under me but he has had no instructions from me as to the handling of this track construction. Having been a party to the formation of the authority for expenditure I know it is our intention to build the track as called for in our agreement with the Rose Estate, but we do not now intend to build the road for which we got authority to spend the money over the San Francisco Bay Toll Bridge Road. We had no definite intention as to when we would cross the toll road. We simply got authority for trackage to correspond with the donated right of way. We would have been just as well off if we had not asked for authority to build the track across the toll road and northerly thereof but in accordance with our usual practice authority was requested to build the track the length of the deeded right of way that is to be donated.

When we get an authority for expenditure that means in a very broad sense that we propose at some time to build a road covered by the authority. We have authorities for expenditure that are not fully used. Our authorities are sometimes not all used for various things. We might get an authority to build a certain trestle and we might build a trestle somewhat shorter than called for in the authority. When any authority is issued the officers handling the matter are privileged to use their judgment, conferring with their superiors if necessary, as to whether they will use all the expenditure or not. Usually, the work contemplated by the authority

(Testimony of F. L. Burckhalter.)

is carried out. In some cases [102] it must be carried out if at all undertaken, as, for instance, in the construction of a building. When it comes to matters such as track, the full length of track as authorized by the authority may not be immediately built. There are perhaps cases where it is never built. The authority for the track in this case goes as far as the donated right of way, and it is co-incident therewith, but our intention is now not to undertake the crossing of the toll road, for the very good reason that we should not cross that road until there is some reason for crossing it. I think if there was a reason for crossing the toll bridge highway we would do so or endeavor to.

There is some high land at San Mateo Point. In fact, it is a hill or knoll. It is the highest land along the coast in that immediate vicinity. So far as solidity of foundation is concerned, that land would be more available than this filled land of the Rose Estate, if industries wanted to build up on hills and on very irregular ground, which they never do. Industries never build on hills like San Mateo Point. It is about 100 feet high and the slopes are quite precipitous, that is, they are quite steep slopes. The 1900 feet of track which I said would be built along the main Southern Pacific line between San Francisco and Los Angeles is in addition to the 8,200 feet, making approximately 10,160 feet. Your question suggesting that the cost of this track was about $50,000 a mile was in error, because this cost includes this 1960 feet of track. So there

(Testimony of Wyman E. Simpson.)

would be about 10,000 feet of track, and that would be built for $73,000, so that the cost would be a little over $40,000 a mile. The 8,200 feet is the track authorized and includes the entire length shown on the authority for expenditure, including the portion northerly of the toll bridge highway.

TESTIMONY OF WYMAN E. SIMPSON, FOR PLAINTIFF.

WYMAN E. SIMPSON, a witness called by the plaintiff, being first duly sworn by the master, testified as follows: [103]

On Direct Examination by Mr. MANNON.

I am the outside manager of the San Mateo Feed and Fuel Company, and I reside in San Mateo. I really do not know much about this 1400-foot piece of track just inside the San Mateo city limits. I have never been on the track. I do not remember selling any materials for the new track to the Southern Pacific. Mr. Couples, an engineer for the Southern Pacific, came to me and rented a Caterpillar plow and scraper. Our company has had dealings with him over a number of years and he has signed different orders. He did not tell me what the equipment was wanted for.

To tell you the truth, I couldn't tell you whether or not he came in this year or last year to hire this equipment because I don't remember. I think it was last fall but I would not say for sure. I read in the newspaper about this piece of railroad

(Testimony of Wyman E. Simpson.)

being built about two or three days after he rented this equipment. It might have been this spring or it might have been last fall. Mr. Couples in the forenoon of a Friday or Saturday told me he wanted equipment sent to the southern part of San Mateo and I told him I would have it sent immediately. Mr. Couples stated that the equipment was to be used for grading but he did not state what was to be graded. Replying to your question whether I had any conversation with him with regard to whether I was to disclose my conversation with him, I don't think Mr. Couples told me anything outside of wanting this equipment.

"Q. What, if anything, did he say as to whether you were to disclose this discussion he was having with you to other people, or about the renting of the equipment?

A. I don't think he told me anything—I am not sure—

Mr. DURBROW.—Just a moment. I think, your Honor, the question has already been answered. The question is leading and suggestive. [104]

The MASTER.—No, he has not answered the question as to whether or not Mr. Couples asked him to not disclose what the purpose of the renting was. The question has not been answered yet by the witness. I have been listening patiently.

A. Of course, I would like to have a little advice, first; I don't want to answer questions like this, because we are in business.

The MASTER.—That makes no difference. It

(Testimony of Wyman E. Simpson.)

is a perfectly proper question whether the Mr. Couples to whom you have referred asked you not to disclose the purpose for which he was seeking to rent the equipment that you subsequently furnished to him. That is the substance of the question. That is a direct question, and you must answer it.

A. Well, as I have answered it two or three times, I don't remember whether he asked me or not.

The MASTER.—No, you have not answered it. Did he or did he not.

A. I don't know whether he did or not, because in our business we never discuss with outsiders what people want. We are in business, and if people want things, we just go and do the work and rent them things, and we never say anything about it. I never talk to anyone about other peoples' affairs. I don't know whether Mr. Couples came out and asked me not to say anything about it or not.

Mr. MANNON.—Q. He may have?

A. He might have said, "Now, don't say anything about this, Mr. Simpson." He might have said that, but I don't remember him saying so. I do remember we were very busy. In order to get this equipment, I had to go out and get it—

The MASTER.—You have answered that three or four times. Now, as to the direct question, you say you can't remember?

A. I can't remember."

Now you have called me in here and I didn't

(Testimony of Wyman E. Simpson.)

know what I was coming here for and all of those orders, we have so many orders [105] that I can't remember them, and I don't try to. If I was to put you on the witness-stand and ask you things that happened months ago that you did not pay any attention to when we have so many orders like this, you could not answer it, and I cannot answer you intelligently on things that I know nothing about without checking up.

TESTIMONY OF W. H. KIRKBRIDE, FOR PLAINTIFF.

W. H. KIRKBRIDE, a witness called for the plaintiff, being first duly sworn by the master, testified as follows:

On Direct Examination by Mr. MANNON.

I am engineer, Maintenance of Way and Structures of the Pacific System, Southern Pacific Company, and have held that position since the close of the war, March, 1920.

I deal with the railroad property in the city of San Mateo, California. I verbally ordered the construction of the spur-track under discussion near Leslie in the city of San Mateo. I gave the order to Mr. Mathews, an assistant engineer working for me. Having consummated the agreement and the deed, and recorded it—the Emma Rose property—. I instructed that the construction of the track be proceeded with without delay, and I wanted it expedited, there had been entirely too much delay

(Testimony of W. H. Kirkbride.)

already in connection with closing out the matter. I told him to build the Emma Rose spur, but did not particularly give him any description of the track except that the track was to conform with our authority with which he was familiar, and in accordance with the engineering details that we had worked out in connection with surveying the exact property line, and in working out the details of the agreement for easement with Mr. E. S. McCurdy, the maneger of the Emma Rose properties.

I gave instructions to Mr. Mathews either Thursday afternoon or Friday morning, that is, either the 21st or 22d of March of this year. I told Mr. Mathews probably in this language, or to this effect: I want you to get busy and build that track, we have been talking about it for about four years, and I will expect you to get results in about four days. That was said in a facetious way, but, nevertheless, I said that with the idea of [106] impressing upon him the fact that I was disgusted with the difficulties that had been presented to us, and I wanted something done before we found something else that would interfere with the work. I gave him no instructions to continue his work over Saturday afternoon and Sunday and did not instruct him as to where he was to commence building. I said nothing specifically to Mr. Mathews about whether he was to commence building from our track or half a mile away from there. I called attention to the fact that there were difficulties in the way, where a drainage canal exists, into which a broken

sewer debauched from our main line to and beyond the Leslie Salt place. As to instructing him in regard to the exact detail where they should start, I did not so instruct him.

I had no particular discussion with Mr. Mathews at that time as to whether this track would cross the Bay Shore highway although that was a matter of general knowledge and had been talked about. We had in connection with studying this problem, realized, of course, that the Bay Shore highway was to build in that territory. That was not laid out when we started this project, but at the time when we ordered this work done we knew closely where the Bay Shore highway would be. The Bay Shore highway does not exist at that point. No right of way had been secured. The Bay Shore highway terminates at 5th Street, San Mateo, over 4,000 feet north of this point. We anticipated no trouble with the highway engineers in connection with that. If we were the first crossing party we assume that the crossing would be handled on the usual business methods under which the highway engineers and myself are working all the time as to easements, etc. I expected this track to cross the Bay Shore highway. We knew that we would cross the Bay Shore highway as projected but not as constructed. The highway across the Rose property was not constructed at the time we are talking about now, and no right of way secured. [107]

I said nothing particularly to Mr. Mathews with regard to crossing the projected line of the Western

(Testimony of W. H. Kirkbride.)

Pacific California Railroad Company because in consummating the agreement with Mr. E. S. McCurdy, of th. Emma Rose properties, a certain provision had been written into the agreement whereby we would not oppose or hinder or object to the crossing of the proposed Western Pacific—I do not recall the corporate name—in case they got a certificate from the I. C. C. to build. At the time the agreement was closed with Mr. McCurdy, we knew that the Western Pacific California Railroad Company would cross the Emma Rose property northerly and southerly if they got authority. The provision in the Emma Rose deed about the Western Pacific California Railroad crossing is contained in Plaintiff's Exhibit 7 and is as follows:

"That Grantee will not oppose the crossing of a proposed line of railroad to be constructed by The Western Pacific Railroad Company or The Western Pacific California Railroad Company, or by any corporation controlled by either of said companies, across the right of way hereby conveyed, and that if said crossing is approved by the Railroad Commission of the State of California, the Grantee will, whenever said proposed line of railroad is constructed, grant to such other company the right to construct at its sole cost and expense its railroad across the right of way hereby conveyed and the tracks constructed thereon by the Grantee, subject to the terms and conditions of the usual and customary form of crossing

(Testimony of W. H. Kirkbride.)

agreement to be executed by Grantee and such other company."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

The instructions to Mr. Mathews were to the effect that we would not build across the San Francisco Bay Toll Bridge road.

The original agreement with the Emma Rose people in 1925 was to the effect that the Southern Pacific Company would build this spur-track across the property, and to the outermost or northeasterly limits, provided the Emma Rose property would donate the right of way; also on the condition and understanding that their property was to be devoted to industrial purposes. Such negotiations followed along for nearly four years, that is, [108] from the year 1925 to the year 1929. That principle was still controlling. It was therefore perfectly natural, we having secured our authority, to consummate the agreement whereby we secured a right of way to the boundary line of the Emma Rose property. The first authority contemplated that we would project outside of the Rose property and into the McClellan property. There was another company that was considering an improvement outside the McClellan property. Mr. E. S. McCurdy at that time contemplated securing a right of way from them as well as from his own company for this track. However, that proposition failed so far as the McClellan and the outside property were concerned. There-

(Testimony of W. H. Kirkbride.)

after we confined our proposition to the Emma Rose property solely.

The right of way we dealt with in the first authority for expenditure was in a different place on the Emma Rose property from the right of way that we subsequently secured, but we attained the same object and got out into the same property.

"Mr. MANNON.—And the first one, as I have called to your attention, was an extension easterly clear beyond the Rose property.

Mr. KIRKBRIDE.—The immediate authority did not authorize us to build the track, but it authorized us to negotiate and secure the right of way.

Mr. MANNON.—Then you took up with Mr. McCurdy, I take it, the securing of a different right of way from that at some later time, did you not?

Mr. KIRKBRIDE.—Yes; it became necessary to get and we succeeded in getting a different right of way leading off from our main line right of way.

Mr. MANNON.—And that right of way extended across this toll bridge highway which you secured?

Mr. KIRKBRIDE.—The last right of way did.

Mr. MANNON.—And that was after a discussion with the representative of the Emma Rose Estate, Mr. McCurdy, with regard to what you wanted, was it not?

Mr. KIRKBRIDE.—No, not with regard to what we wanted, particularly, but what he wanted.

Mr. MANNON.—That is, you had no discussion with him at all, then with regard to securing any

(Testimony of W. H. Kirkbride.)

right of way on the easterly side of that toll bridge highway? [109]

Mr. KIRKBRIDE.—It was understood that the right of way was to go to the northeasterly boundary line of their property. That took us across the toll bridge road.

Mr. MANNON.—Did you have any discussion with Mr. McCurdy yourself, with regard to the purpose of securing that right of way?

Mr. KIRKBRIDE.—No.

Mr. MANNON.—Didn't you tell him you were going to build a railroad over it?

Mr. KIRKBRIDE.—I may explain here that a good many of these negotiations—

Mr. MANNON.—Will you answer my question, please, and then explain afterwards if you want to. I asked you whether you told Mr. McCurdy you were going to build a railroad on the right of way you were getting from him.

Mr. KIRKBRIDE.—Our agreement with Mr. McCurdy specified that we were to build to the southwesterly line of that toll road.

Mr. MANNON.—Now, will you answer my question? I asked you whether or not you told Mr. McCurdy you were going to build a railroad on the right of way you were securing from him across the toll road.

Mr. KIRKBRIDE.—Ultimately we might, if he required it.

The MASTER.—You say if he required it.

Mr. KIRKBRIDE.—Yes."

(Testimony of W. H. Kirkbride.)

I had an option to buy but had not consummated the details with the Leslie Salt Works for a right of way for the road over that company's property. I had not secured the title. It was not our intention to immediately construct that portion of the track on the salt pond. I did not tell Mr. Mathews to build across the Leslie Salt Works property and I did not expect him to do so until I secured the right of way, but you will understand that from thirty to forty feet of this right of way we had already secured from Emma Rose, connecting with our right of way, but because of engineering reasons, and because I wanted more right of way, I bought an additional strip of land from the Leslie Salt people. That might be necessary as an engineering proposition as the ultimate development but not immediately necessary as it was my [110] intention to put in a curve to the north, resting solely on the Emma Rose property, there being construction difficulties before we could put in the connection toward the south. I was going to make a connection with our main line at or near Leslie by a curve to the north over the Emma Rose property. We have no right of way to make that curve, but I had verbal permission from Mr. McCurdy to do so and Mr. McCurdy knew of it. The reasons why we commenced to build a road over this land where we had only a verbal permission to build on the Emma Rose property and no right of way over the Leslie Salt property, were as follows:

Prior to September 21, 1925, we had secured per-

(Testimony of W. H. Kirkbride.)

mission to negotiate with the Emma Rose property manager, and agreed with him that if his property were made industrial property we would build the necessary switching or drill tracks. That resulted in certain representatives of the Southern Pacific Company and Mr. McCurdy, and the secretaries of three Chambers of Commerce, appearing before the city council of San Mateo, and publicly announcing that an agreement had been arrived at whereby a spur-track was to be built in to the Emma Rose property. Statements were made that it was desired to pick out the definite route, and that there were certain paper streets that had never been opened up to be closed. The committee requested the City Council to appoint a committee to work with it to work out these details. The proposition was received enthusiastically, but very shortly thereafter we met with opposition, as expressed by the dealings and actions of the city manager of San Mateo. He refused to close the streets. He refused to assist before the City Council in getting permission to cross certain streets. He demanded exorbitant conditions as represented by the fact that before he would permit our siding to cross over Ninth Street, which was an unimproved street and with very little traffic thereon, the Southern Pacific Company, wholly at its own expense, should build [111] a subway, which we estimated would cost not less than $175,000. We stated that we would not consider that, that any grade separation problem must be considered on its own merits, solely; fur-

(Testimony of W. H. Kirkbride.)

thermore, that it was exorbitant, and could not be considered in connection with the Emma Rose spur; and, furthermore, that the slight amount of traffic over Ninth Street, and the fact that Ninth Street did not lead anywhere, did not justify it. The closing of the paper streets, and the closing of certain alleys in other streets was refused. During the entire year 1926, in constant repetition of these negotiations, nothing was accomplished. During the year 1927 the Emma Rose people, by legal means, endeavored to close these paper streets, whereby a certain tract of land immediately contiguous or adjacent to our right of way had at one time been subdivided but never sold off and the streets never graded. They endeavored by legal proceedings to close these streets, and vacate the property for acreage, so as to be used for industrial purposes. They failed in this. Toward the end of 1927 the suit was withdrawn. We saw that it was impossible to overcome the opposition as represented by the city manager of San Mateo. We therefore began to cast about to see if we could find a right of way on which we could build a track from our track into the Emma Rose properties that would not cross any public streets. If such a right of way could be found we would then be independent of the City Council, because if you cross a street you must not only get permission of the city authorities, but you must also then go to the Railroad Commission and get their authority. We discovered that there was a narrow tract of land, we

(Testimony of W. H. Kirkbride.)

thought at that time about 150 feet wide, of the Emma Rose property adjoining our right of way immediately north of the Leslie Salt Works. No streets were crossing this tract of land whatsoever. With Mr. E. S. McCurdy we worked out a new route, whereby we could build the Emma Rose spur, being solely on the right of way that we would secure from [112] the Emma Rose people. This having been worked out, we then made a revised request for expenditure, submitted it in the proper way, and secured authority. When we came to make detailed surveys, we found that we would have to encroach somewhat on the cooling ponds and on the levee, and a certain portion of the property of the Leslie Salt Works. I would like to refer to Exhibit 6 now, if I may. Referring to Plaintiff's Exhibit 6, the property that I am describing is the strip of land outlined in yellow immediately north and adjacent to the south limits of San Mateo, and on the west connecting with the right of way of the Southern Pacific Company. The manager of the Emma Rose properties insisted on retaining for the Emma Rose people a strip of land 60 feet wide parallel to and immediately south of the southerly boundary of the subdivision represented by Blocks 40, 41, 42, 43, 44, 45, 46, and 47. Therefore, the 50-foot right of way which Mr. McCurdy had agreed to give us could not be obtained immediately adjacent to the salt ponds of the Leslie Salt Works, which lie south of the south limits of San Mateo, and adjoining the railroad

(Testimony of W. H. Kirkbride.)

right of way on the west; we therefore negotiated with the representatives of the Leslie Salt people to secure a strip of land about ten feet wide, and of a larger area to permit of the proper curve being made in building our track. It so happened that such survey meant that we would encroach on the cooling ponds of the salt works. These had to be relocated, or a substitution for the cooling ponds made. Our ultimate agreement with the Leslie Salt people was to the effect that they would give us the right of way, and that we, in turn, must give them a modern cooling tower that would take the place of their old-fashioned cooling ponds or spray ponds. This additional strip of land ten feet wide parallel to the strip of land approximately 40 feet wide that we secured from the Emma Rose people was necessary only because I deemed it advisable to get at least 50 feet of right of way on account of the levee, and a drainage ditch that existed, [113] as I realized there would be some interference with the levee, as well as with the drainage ditch, and that we would require additional land in order to take care of the situation south of our proposed track. These negotiations consumed a good deal of time. It was necessary for us to make a third request for revised authority in order to get the additional authority for the tower, and on account of the fact that we were securing additional property from the salt people. This is the same authority for expenditures which has been introduced in evidence, there being two revisions subsequent to the original authority.

(Testimony of W. H. Kirkbride.)

At the time we started the negotiations and received our authority to build the Emma Rose spur, the Bay Shore highway was just being talked about. As I recall it, there was no assurance where it would be, or whether they would build south of San Mateo. Furthermore, the toll road which has been mentioned had not been conceived and was not constructed. During all these months and years we felt that we had the opposition of the city manager. We knew that he would be surprised and disappointed on finally realizing that we had succeeded in getting a right of way, as I have just described, that did not cross over any public streets or alleys, and, therefore, he would have no authority in connection with dictating as to what we should do. I firmly believe that when I started to build this track that he would use his efforts to checkmate us and possibly succeed in stopping us. Having recorded the deed, I therefore instructed that the work be expeditiously carried out. I did not contemplate any opposition from the Bay Shore highway, because I was aware of the fact that at least in four instances in securing a right of way from South San Francisco to San Mateo they had accepted deeds in which the property owner had the right subsequently to build railroad tracks across the highway, either at grade, under grade, or over grade. Furthermore, I had knowledge of the fact [114] that throughout the State of California we had many spur-tracks crossing highways, county roads, and streets, where dense traffic exists, and in no case that I know of do the tracks cross other

(Testimony of W. H. Kirkbride.)

than at grade. Furthermore, I knew that this highway leaving San Francisco crossed over an industrial spur-track at grade, known as the Carrol Avenue track, in an industrial district that has come up within the last three years. And furthermore, that this highway crossed the Southern Pacific's spur at grade in the vicinity of the county line near Bay Shore. And, furthermore, that this highway would cross a spur-track which we have at Redwood City, leading out to the cement works. And as the highway engineers and myself had worked out a great many problems whereby the railroad company granted them easements without cost for their highway construction, I did not contemplate any particular opposition from the highway engineers. I, of course, did not contemplate any opposition from the Western Pacific, because I presume that the provision in the Emma Rose deed protected them to their satisfaction.

We were confronted with a construction problem in building this track, namely, there was a certain drainage canal extending out from our right of way, and more or less parallel to the route which we had established for our spur-track; this drainage canal was filled up with very stagnant and unsanitary water, due to the fact that a broken sewer was discharged into this canal. Beyond the levee of this canal was a level piece of ground that was probably 2,000 feet in length along our proposed spur that was perfectly level, where no grading

(Testimony of W. H. Kirkbride.)

was required. A track could be laid there expeditiously while other members of the construction gang were cribbing and working out their construction problem along the drainage canal. We could not immediately fill this in. There being no material available, my method of construction was about as follows: The track was to be laid practically on the surface of the ground; where it was too irregular as to surface, -[115] the ends of the ties would be nipped up by shoveling a little dirt under the ties and in between, so as to get what might be called a rough running surface; then we would bring in from the Logan Quarry, which is located about seven miles north of Watsonville Junction, material which we use very extensively in all of our construction work within reasonable distance of Logan, namely, base rock and waste; we would bring this material in, loaded in ballast cars, that is, center-drop cars, run a cut of cars out on this spur and unload the material and jack the track up to get the desired surface and the grade that we were desirous of getting. Furthermore, our agreement with the Emma Rose people specified that we would make the grade line of our track conform to their development, or to whatever level they raised their ground to in connection with the industrial development. It was, therefore, my intention to lay this track on the surface of the ground, pick it up only sufficiently to give it a good running surface until such time as the manager of the Emma Rose property could definitely state

(Testimony of W. H. Kirkbride.)

the grade line he wanted and which, of course, would depend on the wishes of the industries that he located.

I didn't know what the city manager of San Mateo might do to stop us. I didn't think that he had any legal authority; I realized that there was a sewer that was broken, stopped up, the sewage was running into this drainage canal, and that we were to a certain extent changing it or constructing over it. I did know, however, that this sewer did not belong to the city, that it had been constructed about 1905 by private owners, as reflected by the fact that we had given them easements across our right of way. We had the document whereby they secured an easement from the original owners of the Emma Rose property. I did not think he could get out an injunction, but I believe that he would do it, and as things turned out he did stop our work by injunction. We anticipated the city manager of San Mateo would try to checkmate us by the use of some injunction or by the [116] use of some police authority, though I did not seriously consider an injunction. I knew he would be disappointed at the fact of our having found a solution of this problem, and I expected he would resist our work. I feared that the city manager might have recourse to the courts in resisting our work. I told this to Mr. Mathews.

I did not tell Mr. Mathews that it was necessary for him to work over a Saturday afternoon and Sunday in order to avoid the city manager of San

Mateo having recourse to the courts. Generally we do not work Sundays. We avoid it when possible. There was a misunderstanding in connection with the working on Sunday. I had issued instructions, either late Thursday afternoon or Friday morning, that they were to get busy and build this track, and I didn't want any delay about it. Those instructions were taken literally, and the men worked Sunday. The instructions to Mr. Mathews had no reference to avoiding recourse to the courts that the city manager of San Mateo might have because if a person wanted to put over something, Sunday is the worst day to start work because people are out picnicking and vacationing. Sunday picnickers would have been in the neighborhood of where this track was started, and they would have seen work of an unusual character done on Sunday whereas they would have paid no attention to such work done on other days. The city manager of San Mateo, to whom I am referring, is Mr. Weissgerber.

The construction of the Rose spur was just one job out of many. During the year we have on an average some 4,000 authorities given to us, and at the time this job was going on I had actually under way over 1300 authorities, at least two hundred of those authorities being the construction of track—spur-track sidings. These investment expenditures range in the neighborhood of $16,000,000. I also had in mind that our maintenance of way expenditures, which also are made under my jurisdiction,

(Testimony of W. H. Kirkbride.)

amounted for this year to $27,800,000. It is my duty to make every [117] effort possible to see that that money is spent, and every one of these jobs completed during the year. It requires a vigorous attitude and a following up constantly of some thirteen superintendents, with their division engineering organizations, over which I have authority. It is customary for me to instruct our superintendents and their division engineers to get these authorities and to carry them out very quickly. We put big gangs of men on these jobs and wind them up so as to get to the next one; otherwise we would absolutely get nowhere with our program. If I stated it was our intention to go across the McClellan property, I meant that the project contemplated the possibility of doing that with a right of way. The first authority for the work did not extend beyond the limits of the Rose property.

The definite route of the Bay Shore highway in the vicinity of San Mateo was adopted by the Highway Commission in October, 1926. As early as 1925 I knew in a general way that the highway was projected down the Peninsula and that it would probably be to the east of our line and to the west of the shore of the bay.

I do not recall any particular trouble in getting across the highways in California with our switching tracks. It was only recently that I consummated an agreement whereby a spur-track to serve an industrial district existing along Reed Street in San Jose was to cross the Monterey Road at

(Testimony of W. H. Kirkbride.)

grade in connection with our relocation of the main line at San Jose. I had some little discussion of the problem, but the highway engineers finally agreed to it, and the California Railroad Commission approved. That applies to every crossing that we asked for.

The usual method of construction would be to build our tracks starting at or near Leslie and then following it out from the railroad and bringing along the material with us, but not necessarily the proper method under present methods of construction whereby we have machinery to handle material, whereas we formerly did not have machinery. [118]

The amount of money which has already been put into the 1442 feet of track on the ground is between $2,500 and $3,000. There is no doubt that there are more ties across the Bay Shore highway than across any other part of the uncompleted track. At this place some dirt was taken from the side of the track and thrown over the ties to give the rail a kind of surface. There was no need for haste for any temporary right of way because of any expected traffic over the line.

Under our deed we had six months to build a line but I do not think that was ample time. As the facts have shown, you run into all kinds of difficulties that interfere with doing your work. Mr. McCurdy had left for New York, with the idea of putting this property on the market, and it was important to have a track there so that we could show him what there was there, and to show our

(Testimony of W. H. Kirkbride.)

good faith in building the track. It was ample as far as the physical features were concerned. I think it would take about six weeks to build that track. It would be several months before I could construct a track through the cooling pond. Some rails and a few ties were laid down immediately adjacent to our main track out perhaps 100 feet. These were for push-car tracks, for unloading the rail and ties that were to be used immediately adjacent to the right of way, constructing eastward from the main line while other men were working westward. If we had not been interrupted these men would all have connected up with their track. It was up to the roadmaster and his section-men to arrange the exact method in which they did the work. I do know that an extra gang was moved in there to assist the section foreman but I gave no detailed instructions as to how many men should be put on the work or from where they were to come or which particular part of the road was to be built first or which part completed first.

I know that more ties were laid across the right of way of the Bay Shore highway than on any other part of the road. I first learned that after the city got out an injunction and [119] stopped our work, followed by an injunction by the Western Pacific. I went down there. I may say that that is a perfectly normal way to build a track, to put in a few ties under the joints, spike the rail to gauge, and come along and fill in the rail panels. If we had not been stopped by the injunction there would

(Testimony of W. H. Kirkbride.)

have been a completely tied railroad connected up to the main line. I do not think it was intentional that the ties were completed under the portion of the track which crossed the Bay Shore highway, for the reason that I observed that the foreman was filling in all the time from what we will call the westerly end of the rail to and beyond the so-called highway.

We have had some discussion at public meetings with the Bay Shore highway people with regard to a separation of grades of this particular track and the Bay Shore highway at the intersection thereof. The cheapest grade separation that can be worked out at this place consists of passing the railroad over the highway on a pile trestle with a girder 76 feet in length, passing over the paved portion and the shoulders of the highway. Such a structure would cost somewhere between $60,000 and $70,000. It is not a satisfactory structure from a railroad point of view on account of the steep grades that are involved in order to get over the highway. A separation of grades which would be satisfactory at this point from a railroad point of view would cost from $125,000 to $150,000. Such a plan would contemplate a considerable elevation of the highway and a depression of the railroad.

"Mr. MANNON.—What has the suggestion been that you have made with regard to the division of that cost, if you have made any?

Mr. KIRKBRIDE.—After the controversy arose, Colonel Skeggs wrote to our general manager, sug-

(Testimony of W. H. Kirkbride.)

gesting an opportunity to discuss this matter. For the immediate week thereafter Mr. Burckhalter and I were out on the road. Upon our return we endeavored to make a date with Mr. Skeggs, but failed. I personally called [120] on the Colonel, however, in his office, and discussed the matter. Then I went to Sacramento and talked to Highway Engineer Purcell, and to Attorney Carlton. After some discussion we all went down into Director Meek's office to discuss the matter. As an outcome of Mr. Meek's suggestion that we try to get together as engineers and work out a solution of this problem, I returned to San Francisco and had prepared the scheme of grade separation which I have previously described. I wrote to Mr. Purcell, proposing, in part, that first in reply to Attorney Carlton's question, which had been given to me verbally, that we would grant an easement to the highway across our right of way. I further proposed that the track remain at grade until such time as in the judgment of the Railroad Commission, due to the traffic on the highway and the railroad, that a grade separation be necessary, in which event I proposed this elevated trestle. I furthermore offered that when the time came to do that we would follow the method of distribution that we generally agreed upon in previous cases, namely, that the railroad would bear 25 per cent of the cost of the structure and the highway 75 per cent. I think that was the basis of my letter.

(Testimony of W. H. Kirkbride.)

Mr. MANNON.—And you have not made any proposition of paying 40 per cent of the expense?

Mr. KIRKBRIDE.—Subsequently we did.

Mr. MANNON.—So you have made a proposition to divide the cost with them on the basis of 60 per cent to the State, and 40 per cent to yourself; that is correct, is it not?

Mr. KIRKBRIDE.—Yes.

Mr. MANNON.—And that was after this other long story that you told about the 75 per cent and the 25 per cent?

Mr. KIRKBRIDE.—I should add that in my letter that was our proposition, yes; that while I outlined on the basis of 75 and 25, I proposed as a method of our endeavor to get together [121] the 40 per cent to the railroad, and the 60 per cent to the highway."

The center line of the partially constructed track is 20 feet southerly of the northerly line of the right of way in the portion where the right of way was fully 50 feet wide. When we get into that territory paralleling the paper subdivision opposite blocks 40, 41, 42, 43, 44, 45, 46 and 47, it is not that far away, because the width of the right of way is not uniform at that point.

The reason for this is that in leaving our main line we pass through the cooling pond of the Salt Works, and it was important to keep our curve as far out of that pond as we could, consistent with the curvature that we wanted. That naturally threw the tangent of our track running in an east-

(Testimony of W. H. Kirkbride.)

erly direction northward. Furthermore, immediately along the track for quite a considerable distance, and south of the track, were the levees of the salt ponds confining the salt water. Furthermore, on this right of way, and on this 60-foot strip retained by the owner was this irregular drainage ditch. We therefore had a problem that led to the belief on our part that it was best to throw our track to the northerly part of the property, which we had secured from Emma Rose. Furthermore, at a certain point this drainage canal would pass under our track. Its definite location as it continued on to Seal Creek was such as to make me believe that when the property came in industrially this drainage ditch should be located parallel to the railroad track, and that, no doubt, we would have to use a portion of our right of way for that purpose. That was a further reason for leaving the greatest width of the right of way on the southerly part. Now, continuing eastward from that point beyond the subdivided land, and beyond the street known as Bayview Boulevard on Exhibit No. 6, we laid our track and propose to maintain our track approximately on the surface of the ground, with only sufficient Logan waste to [122] surface up the track properly. But our deed condition with the Emma Rose people provided that we must raise our track to conform to any grade line that they establish for the final filling in of their lands; when that time came I realize I had to have a kind of a borrow-pit along there in order to raise my track

up. That borrow-pit would be on this little extra width of right of way on the southerly portion, the idea being that having raised our track up on the solid material, that would be excavated by an Insley shovel, or some small excavating tool of that kind, and that dredgers would then pump in the material and fill it in, and that our core would be on solid dirt. I had just gone through a proposition of that kind in connection with the building of the Ford plant at Richmond.

I procured a copy of the form of agreement for industrial spurs which my company now has in general use. It is marked "Approved as to form by general solicitor, July 25, 1929." I think there was an earlier form substantially the same in use prior to July 25, 1929, although I am not specifically acquainted with the details of these forms. As far as I know the following clause or one of similar tenor has been inserted in all of the industrial track agreements which my company has used since I have been connected with it: "Industry will pay the entire cost of constructing and maintaining said track and its appurtenances, except that railroad will pay the cost of constructing and maintaining that portion or portions of said track from the point of the initial switch or switches thereof to the clearance point in the center line thereof, which said clearance point is thirteen (13) feet distant measured at right angles, from the center line of the track from which said track will diverge. It is understood, however, that if said track is an ex-

(Testimony of W. H. Kirkbride.)

tension of or will diverge from an industrial track, industry will pay the entire cost of constructing said track and its appurtenances, and [123] also the entire cost of maintaining said track and its appurtenances. Railroad shall maintain said track and its appurtenances in good condition and repair, and industry agrees to pay railroad industry's share of the cost of maintaining said track and its appurtenances." Such agreement is entitled "Industrial Track Agreement" (introduced in evidence as Plaintiff's Exhibit 12). This is a form that is used generally in connection with industrial spurs. Frequently it becomes necessary to have the contract agent write a special form. The form referred to is in such general use that we print the form. I discussed with Mr. Shoup the construction of the track we have been talking about after as much of it was put down as is indicated on the map. I was called upon to explain the circumstances of that construction. This conversation was held either on or between the dates March 25 and April 1st of this year. I do not recall that I have ever discussed with Mr. Shoup the use to be made of that track.

In case a large industry wished to locate in the immediate vicinity of this track over the Rose property, but off of the Rose property, I would present the proposition as an entirely new project to the management, and abide by their decision. I would be expected to report only with blue-prints illustrating what the project was, and outlining the en-

(Testimony of W. H. Kirkbride.)

gineering details as represented from a preliminary investigation. I would not necessarily suggest that this track be used to supply an industry immediately adjacent to it though off the Rose property, but I might. I would first be guided by the report of our Traffic Department and would watch out for engineering difficulties of construction and the feasibility of construction. It would be necessary for me to call attention to the fact that our authorities would permit us only to build such tracks as the owner of the property, namely, the Emma Rose property, might want. I am referring to the agreement with the Emma Rose people, that is the Rose deed as the authority limiting the use of that track. The agreement with the Rose [124] people, that is, the deed, provides that we will build a track into the Emma Rose property, and will build drill tracks off of that as the development of the property may require. We would recognize, of course, that the only right of way that we had was the right of way that this deed conveys to us.

The first limitation in the deed to the Emma Rose property which is Plaintiff's Exhibit 7 is: That the parcels of land hereinabove described as parcels 1 and 2 shall be used by the grantee for railroad purposes only.

The second limitation is: That the grade or grades of railroad track or tracks on parcels of land above described, and the elevation of said track or tracks, shall be such as to best serve the land as it now is for industrial purposes, and the elevation of

(Testimony of W. H. Kirkbride.)

such track or tracks to be constructed on said parcels of land hereinabove described shall be subject to the approval of the grantors, and in event that the grantors fill their land adjoining said parcels of land above described, grantee will, upon receipt of written notice from grantors, raise said track or tracks and fill the parcels of land above described to the same level as said adjoining land of the grantors.

Of course, there is the provision that if we violate or make any breach it will invalidate the agreement.

The interpretation of the deed from the Rose Estate and the engineering question involved are the considerations which would determine in my mind whether I would report favorably on the use of this track for other industries off the Rose property. The question would then become an economic one and one of the anticipated business to be secured.

On Cross-examination by Mr. DURBROW.

As engineer of maintenance of way and structures of the Southern Pacific Company, I have complete jurisdiction over the maintenance of all the property extending, roughly, from Portland through San Francisco to Los Angeles, and to El Paso, Texas; from El Paso, Texas, to Tucumcari, New Mexico, and extending eastward from San Francisco to Ogden, including all lines within that [125] territory. My jurisdiction covers the maintenance of the track and all of the appurtenances,

(Testimony of W. H. Kirkbride.)

such as bridges, shops, terminals, yard tracks; it also includes the construction of all auxiliary facilities, such as yard tracks, sidings, and spurs, anything that develops incident to the operation of the present property.

The chief engineer, Mr. G. W. Boshke, has jurisdiction of any new construction of main and branch lines.

The construction of the track in controversy fell within my jurisdiction, and after it had been authorized in the formal way, which has been outlined here in the testimony heretofore given, it became my duty to construct it, and to see that it was constructed expeditiously and reported completed. I could work out the engineering difficulties of location and construction, not extending the original authority or exceeding the appropriation, but to modify it within the limits thereof. That is the authority generally invested in me in constructing all similar facilities. Neither the Board of Directors, nor the members of the Board of Directors, or the president or the general manager or the assistant general manager undertake to detail to me the manner in which that work shall be done.

I have charge of construction of this particular piece of track, the length of which was 8,200 feet, in addition to the 1,960 feet to be constructed longitudinally along and upon the main line right of way of Southern Pacific Company in San Mateo station. The tracks along the main line right of way were primarily a facility to the main line operation in

connection with switching at San Mateo station, and incidentally to that the proposed Emma Rose spur. That track was to be used to serve other industries than those which might locate upon the Emma Rose property, principally at Leslie Salt Works. It was to be outside of the westward track, immediately opposite the passing siding, so as to assist the local freight crew in cutting in and out cars of the train. [126]

The Emma Rose spur, on our last authority, was to extend to the southwesterly line of a new highway known as Toll Bridge Road, that is constructed across the northeasterly portion of the Emma Rose property. The deed provided that we were to terminate the track at this point on the southwesterly line of the Toll Bridge Road right of way.

Generally speaking, the land over which this spur is to be constructed is a level field, commonly known as a pasture field—reclaimed land. In the outermost portion of it there is an artificial harbor that was constructed many years ago, but never utilized, and which is abandoned, and which is now blocked, that is, the entrance to the old harbor is now blocked—this harbor canal—is now blocked by the Toll Bridge Road.

As to the character of the Rose property easterly and northerly of San Francisco Bay Toll Bridge Road: Immediately north you enter the waters of San Francisco Bay. They lap the shore just pos-

(Testimony of W. H. Kirkbride.)

sibly a couple of hundred feet north of the Toll Bridge Road.

The character of the construction of the track under discussion conforms to our usual method of constructing spur-tracks. The rail was to be second-hand 90-pound rail, released from the main line. I should say at this point that our policy is to wear out the rail in the main line, and when it is ready to be removed we then take it up and use it for yard, siding, and spur-track construction. The rail that was being used in the Emma Rose spur was of that kind, second-hand 90-pound rail. That is the same kind of rail that serves the Leslie Salt Works. A turn-out portion of the Leslie Salt Works spur is a 110-pound rail. Any spur leaving the main line, the switch turnout portion of it consists of main line rail—in this case 110. I believe [127] the remaining portion of the Leslie spur is 90-pound rail. All of the industrial tracks that I am building this year, with very few exceptions, consist of 90-pound rail. The reason for that may be explained in this wise: In former years, 75 and 80 pound rail was standard in the main line. As that rail was removed such rail was used in constructing spur-tracks. Along in 1907 the 90-pound rail was adopted as standard. That 90-pound rail now is beginning to come out of the track, and, in fact, we found it necessary, due to increased traffic in 1922, to abandon the use of 90-pound rail, and we adopted 110-pound rail for use on tangent track, and we use 130-pound rail in curved track if the

tonnage justifies; if the tonnage does not justify it then the curve is laid with 110. In other words, there is no more 90-pound rail being purchased for main line use. The old rail is now coming out of the track, the old 90-pound rail is now coming out of the track, due to the fact that it is in some cases as old as 20 years. Therefore, all of our construction, or, rather, a large part of our construction of spurs, yards, and sidings are 90-pound rail because we do not have the 75 or 80.

As to cross ties, they were 7 by 8 redwood ties, conforming to standard construction in connection with the spur-tracks.

In the main line we use a larger tie, a creosoted tie, a fir, mainly, 7 by 9 by 8—creosoted fir, or pine, or gum. The track, as I have previously stated, was to be laid on the present surface of the ground, because it is very solid ground, substantial as to foundation, and holding power. I was to pick it up just sufficiently to give it a good running surface by the use of the waste product that comes from the granite quarries located on our line at Logan. This material is a by-product and a waste product that is left over after the manufacture of crushed rock. The quarry people have great difficulty in disposing of the same. [128] The result is we always keep ballast cars spotted at the Logan quarry, in which this waste and by-product is loaded. We take away numerous quantities of that material and use it in our construction work. For instance, recently we used large quantities of it at Watsonville Junction,

(Testimony of W. H. Kirkbride.)

Del Monte Junction, Salinas, and elsewhere. It was our intention to use that material at the Emma Rose spur. The track, which is part of these authorities for expenditure, that was to be built parallel to the main line, was to be of more substantial construction, and a better grade of ballast, for the reason that we expected the local freights to use it very extensively in connection with their San Mateo business.

The ground over which this spur would extend is practically level, and the grade line would be substantially the same, except for little elevations made necessary to pass over the drainage canal. To all intents and purposes, we would call it a level rolling grade.

As stated yesterday the track was constructed under my authority and jurisdiction and I issued instructions to Mr. Mathews who was at that time the engineer in charge of construction working out of my office. His specific instructions were that I wanted this spur-track constructed without further delay.

I issued instructions that this work should be done expeditiously because we had met with delay subsequent to the meeting of the City Council on September 21, 1925, that was most extremely aggravating to me. The explanation for the opposition we encountered I never could understand or acquaint myself with. Speaking frankly, it centered about the city manager of San Mateo. This was Mr. Weissgerber. I don't know his initials

(Testimony of W. H. Kirkbride.)

just now. It seemed to us that he went out of his way to oppose this industrial development. We knew that the people, generally, wanted it, we had [129] been told that they wanted it, we were ready to build the track, the property owner was anxious to put the property on the market, and we could not understand the opposition that developed on his part to the closing of these paper streets in the southeasterly portion of San Mateo. The land was simply cow pasture. The paper streets had never been opened, or been graded. The other conditions that he put on us we felt were not valid in analyzing a problem where somebody might honestly want to build an industrial spur. Furthermore, during these arguments that arose for nearly four years there were other happenings in San Mateo that made us think that he was against us, such as when we endeavored to fence a certain lot where encroachments were taking place, he came out with his police authority and stopped us. In another case, where Railroad Avenue, on the westerly side of the railroad, passed longitudinally through our property, that is, we owned property outside of this paper road, which did not exist as to grading or use, and the property owners on the outside of our right of way were constantly encroaching on our property, and I wished to move this unimproved road to the outermost edge so as to give the adjacent property owners the benefit of this road approximately twenty feet wide, thereby getting the full use of the railroad right of way for track purposes,

(Testimony of W. H. Kirkbride.)

and he opposed us seriously in that. At the same time, we endeavored to continue good relations by giving him certain easements for the longitudinal encroachment of his sewers, but apparently to no avail. We were accused from time to time of holding up industrial development of San Mateo, that we would not build spurs to help out. This naturally aggravated us, we felt as though it was unjust.

Those accusations were made by Mr. Weissgerber notwithstanding the efforts that were being made to construct these spurs. All of these things created a state of mind where we thought we had [130] opposition on the part of a city official, an unjustified opposition. After we felt as though it was thought we were not honest in our intentions to build the spur, I made up my mind that I would build that spur. Having secured a right of way without incumbrance, and believing that the city manager would resort to anything he possibly could think of, even though it might not be fair means, to stop my work, I instructed that it be constructed without delay, that is, after the deed was recorded. I made myself very emphatic in connection with issuing the orders. As I have stated previously, the final order was given either Thursday night or Friday morning, following the recording of the deed.

The fears which I entertained that Mr. Weissgerger would interfere with the construction of this track were borne out by subsequent events. He

(Testimony of W. H. Kirkbride.)

came out with the chief of police of San Mateo Monday morning and catechised the foreman severely, questioning his authority for doing the work and endeavoring to get him to stop. In addition he got out an injunction which stopped the work. He looked upon that injunction as being a phoney injunction, because of the facts being misstated, and for the further reason that in order to make certain facts correct he sent his men out after the injunction was issued by the Court and constructed a sewer line unauthorized, I think, so far as the property owners were concerned. This injunction was issued by Judge Buck, the local Judge in Redwood City. They built the sewer across certain property of Emma Rose, and also across this newly-acquired right of way of ours; several days thereafter, namely, on Sunday, when I was inspecting the conditions, that new sewer was still in an incompleted condition. The effort was to connect it with another 12-inch sewer, but that had not been done. He also claimed in that injunction that the city owned a certain 12-inch sewer which was really constructed by a land subdivision company, and which the [131] city had refrained from taking over and refrained from maintaining. The facts being so apparent, I then went to the mayor, and subsequently, to the City Council, and laid these various facts before them, and asked them, in effect, why there was any occasion for any dispute between the city authorities and ourselves, and why any occasion for this injunction. The result of that was that

(Testimony of W. H. Kirkbride.)

we speedily came to an agreement and the injunction of the city of San Mateo was withdrawn.

Defendant's Exhibit "C" (original exhibit transmitted to Circuit Court of Appeals under order of District Court) is a map taken from an aeroplane showing the area upon which this construction work was done. It correctly shows the situation in so far as the land is concerned owned by the Emma Rose Estate, and also the lines which outlined the spur-track and the place where the construction was done. It also shows the lines of track which were constructed along the main line right of way and the spur extending into the Emma Rose property authorized by the authority for expenditure. It does not, however, show it for its entire length. This picture was taken before this suit was instituted. The right of way is designated by a darkly-shadowed line extending directly across the map from the left to the right-hand side, and about 12 inches above the lower portion of the map. Upon this map is outlined in black ink the double track main line and the center passing siding, and some industrial spurs of the Southern Pacific Company. The lines in black show the tracks existing at the time this suit was filed and just before we began constructing the spur-track. The red lines show in part the tracks that were to be constructed under the authority for expenditure, known as the Emma Rose spur. The dotted red lines represent the track that was laid by the Southern Pacific Company in March, 1929. The yellow line represents that por-

(Testimony of W. H. Kirkbride.)

tion of the Emma Rose property that is pasture land, but on the records subdivided into blocks, lots, and streets; to answer that [132] otherwise, I would say, that this area extending from Eleventh Street to the southerly portion of the subdivided land, which is approximately 100 feet north of the yellow line on the right-hand side, representing the southerly boundary of San Mateo, is, theoretically, on paper, subdivided into streets and blocks, but they do not exist. That happens to be the property that the owners and ourselves tried to get vacated so that it could be converted into acreage and used for industrial development. The yellow line represents the southerly and westerly, and a portion of the northerly boundaries of the Emma Rose property. The Emma Rose property extends further northerly and easterly than is shown on this map. The mark on this photograph extending at the point where the yellow line breaks after it extends from the Southern Pacific Company's main line right of way and the line extending in a northwesterly direction is a drainage ditch.

The character of construction did not conform to the main line or even branch line construction. It conformed to a spur-track construction. There are numerous cases where facilities of a similar character have been constructed extending from the main line of the Southern Pacific along the Peninsula. For instance, the so-called Beale Street track in San Francisco; also tracks in the Islais Creek district, and further south in San Francisco, between

(Testimony of W. H. Kirkbride.)

our tunnels 3 and 4; on a certain system of tracks known as the Carroll Avenue Drill Tracks; and in South San Francisco a certain spur leaving our Baden Branch and developing a large tract of land being improved by the South San Francisco Land Company. There is a spur exactly similar to this construction at Broadway, Burlingame, where the track is about 2,000 feet long, serving an area of land that the owners set aside for industrial purposes. At San Carlos a similar system of industrial drill tracks has been built; at Redwood City there is an industrial switching spur about two and three-quarters [133] miles in length, extending out to the cement works. The next pronounced development that I recall is at Santa Clara, where there are industrial tracks leading out to industrial developments, such as icing plants, packing-houses, and lumber-yards. There are also similar industrial tracks in Salinas, Watsonville, Guadalupe, we could continue that right on down to Los Angeles.

These facilities which I propose to construct on the Emma Rose property are not exceptional or unusual. We are working on these problems and constructing similar tracks all the time, tracks intended solely and exclusively for industrial switching.

Since 1920 the Western Pacific constructed certain tracks in San Francisco west of Sixth Street and south of Bryant Street, in that general territory, similar in character to our proposed tracks and along their track in the vicinity of our railroad

(Testimony of W. H. Kirkbride.)

in the southerly part of the Oakland territory. The Western Pacific has also constructed a similar facility at Stockton since 1920. There is a spur-track of very great length, possibly six miles, leaving their main line and skirting the northerly portion of Stockton in a westerly direction, thence deflecting southerly and thence deflecting again in an easterly direction, and finally reaching a territory adjacent to the harbor channel in the northerly part of Stockton. The law department endeavored to ascertain whether the Western Pacific Railroad obtained a certificate of public convenience and necessity from the Interstate Commerce Commission to install that facility but have never been able to find any evidence that they did.

When the construction of the proposed spur-track began I called the attention of those who had immediate charge of the construction to the provision in the deed whereby the track was to be constructed out to but not beyond the southerly boundary line of the Toll Bridge Road.

I know the purposes for which this track is to be used. [134] A spur-track is to be used for the purpose of switching empty and loaded cars to and from the industries that may locate on this spur, adjacent to it. I endeavored to describe the Emma Rose track as a spur that was to be used for one specific purpose, namely, the switching of empty cars and loaded cars to and from industries. I might further define it by saying that this spur con-

nects at one end to a siding or drill track parallel to and connecting with the westbound main line.

I do draw a distinction between "Build an industrial track" or "Build a spur track" or "Build an extension track." I would define a spur as being a track connected at one end only to a yard track, or to a main or a branch line, over which regular train service is not performed, it being not equipped with such facilities as depots, telegraph stations, less-than-carload platforms, telegraph lines, and being operated only by means of a road engine or switch-engine, in order to perform the particular work that the spur-track was constructed for. If the track is built to serve an industry, then I would call it an industrial track. A spur may not have any industries tributary to it. We have a great many spur-tracks that are used for other purposes. If it was an industrial track it would be then solely for the purpose of serving some particular industry or industries whereby carload business is performed, but no less-than-carload. It, in turn, would not have any of these ordinary railroad facilities. It would not have the ordinary facilities that you would find on a branch or a main line. If it is a switching or drill track, and if it is a spur, that is, if it is connected at one end to a main line or a branch, or to a siding, or to a yard, and generally extending out more or less at right angles to the direction of the main line, then it would be defined as follows: That a switching or drill spur is a spur upon which empty and loaded cars are switched to

and from [135] industries, and upon which there is no regular service, and upon which no tariffs apply. The word "extension," to my mind, would apply to a proposition whereby a main line or a branch line were being extended in the general direction in which they had been constructed from where they had terminated; in other words, a positive extension of that line into new territory where there were new towns and new stations. There would be regular service under transportation rules, such as time-tables, train orders, and possibly movement control by block signals, and where freight tariffs would apply. In other words, we come down into the definition of a branch line, which is a secondary track, as compared to the main line, and which departs from the main line, and which connects one or more stations outside of the junction point, and over which regular train service is performed. That track might be extended into the adjacent territory represented by cities or communities.

Industrial track agreements such as were introduced in evidence this morning are often executed by Southern Pacific Company. They apply only to the individual track that is constructed for the industry. Generally, for one specific industry. Off of this switching track we proposed to construct would be a spur, relatively short, but of sufficient length to serve the industry that was proposed to locate, or that had located. It would be connected with this switching track at one end by a

(Testimony of W. H. Kirkbride.)

switch. In such cases the company requires an individual industry that might locate on that particular spur to execute this industrial track agreement. The tracks constructed under this agreement and the track that was constructed at the time the railroad was enjoined are entirely different.

The track we were constructing was not for the purpose of spotting cars thereon for the purpose of being loaded or unloaded by an industry. In other words, an industry could not [136] locate within clearance distance of this track and expect to take service directly off the track, because we would not spot cars thereon, we would obligate them to bear the expense of a track constructed not less than 13 feet away from the center line of this track, from which they would take service; that is, the road engine or switch-engine using this for a main artery to drill on would come in and spot the cars on the secondary spur-track, or it might be connected at both ends, so there would be no hampering of free movement up and down the main track—as, in this case, the spur. I should say that the Southern Pacific Company, according to that agreement, and our usual practice, would bear the cost of the switch and the turn-out to the clearance point, and the industry would bear the expense of the remaining portion of the track.

It was necessary to have more than one authority for expenditure, an original and two revisions thereof, for the following reasons:

The first authority started, leaving the main line

(Testimony of W. H. Kirkbride.)

from a siding that was constructed parallel to the main line and extending out into the Emma Rose properties between Tenth and Eleventh Avenue, and which I may designate on the aerial map as being this space immediately north of the yellow line, these streets being outlined. That is, Ninth Avenue being outlined, and Eleventh Avenue being outlined, but Tenth Avenue not being outlined; in other words, there are certain paper streets in there as well as cross-streets. These streets were to be closed, and the paper streets were to be closed southerly thereof. We were not able to accomplish that, however, over a period of two years. The revision of the first authority for expenditure was made necessary because of the conditions insisted upon by the city manager, and the fact that he would not assist in closing these streets. [137]

"Mr. DURBROW.—Am I correct in understanding that the object, and the sole object to be accomplished under that original authority for expenditure was to extend a track into the Rose property to serve industries that would be located thereon?

A. Yes, that is correct.

Mr. MANNON.—Before that question is answered, your Honor, I would like to object to it on the ground that it is immaterial, irrelevant, and incompetent, and that the document, being in writing and signed by many people other than by this witness, speaks for itself.

The MASTER.—Mr. Kirkbride's opinion on the

(Testimony of W. H. Kirkbride.)

interpretation of that document is not a very valuable opinion, is it?

Mr. DURBROW.—I was just trying to take a short cut, your Honor. I thought Mr. Mannon might object.

The MASTER.—Then that question might be disregarded.

Mr. DURBROW.—I am not undertaking, at all, to modify the terms of those authorities, or to enlarge or to restrict their scope at all. I am asking now if that was not the same object that was sought to be accomplished in the second authority for expenditure. Will you answer that question, Mr. Kirkbride?

A. It was.

Mr. MANNON.—And, your Honor, this will all be subject to our objection, that it calls upon this witness to interpret a document signed by other persons?

The MASTER.—Yes.

Mr. DURBROW.—Q. Was that the object to be attained in the third authority for expenditure?

A. It was."

It was necessary to have more than one authority for expenditure because it became necessary for me to leave the main line of tracks at a different point where no streets existed. It was necessary to modify the original authority, because changing to a location conforming to the southerly portion of the corporate limits of the city of San Mateo, it was necessary to go through property of the Leslie Salt

(Testimony of W. H. Kirkbride.)

Works, which was not contemplated in the first authority. That meant additional construction; it meant acquiring property from the Leslie people, and the length of the track being modified somewhat, revised authority was required. I cannot exceed the authority granted, [138] and if there is a radical change in the original plans we submit the proposition anew to our management, to see whether they wish to go ahead with it.

When this authority for expenditure was issued it was the intention of the Southern Pacific Company to construct a track out near to a point conforming to about the middle of the Emma Rose property. I do not know of any intention and neither do I know of any authority now on the part of the Southern Pacific Company to extend the track beyond the limits covered by our authority for expenditure. I may further say that these authorities for expenditure, when they originate in the superintendent's office, must pass through my hands and bear my signature before they will be considered by the general management, and, therefore, we analyze the details and the intentions, and it is our duty to pass upon them. When authority for expenditure is submitted I know that it is the intention to do no more than is covered by that request and that we must not do more. There was no intention on the part of the Southern Pacific to extend its tracks northerly, southerly or easterly beyond the boundaries shown in the authority for expenditure.

(Testimony of W. H. Kirkbride.)

In switching cars across a highway or street our rules provide that the trainmen or switchmen must switch with extreme care, and always have hold of the cars with the switch-engine, that is, they are not permitted to shunt or high-daddy a car or cars across a highway or street, they must have perfect control of the car. They must flag the movement across the highway or the street in question.

On Redirect Examination by Mr. MANNON.

The first authority for expenditure covered the building of some 5,475 feet of track, 1185 feet of which was to be built on the right of way parallel to the main line. There was no intention on the part of Southern Pacific Company at the time this [139] authority for expenditure was issued to extend this track, except approximately into the middle of the Emma Rose tract.

The statement in the authority for expenditure dated January 29, 1926, reading "Property served: Tracks now proposed will serve about 36 acres of industrial property and tracks proposed under future plans will serve to unlimited territory extending clear to the bay," meant to say there were 36 acres immediately available in this territory that we have previously referred to as paper streets location. The Emma Rose property was understood to extend practically to the shore of the bay. As soon as that was developed the track could then be developed out into the Emma Rose property as the acreage came in. The word "unlimited" there is

(Testimony of W. H. Kirkbride.)

not right. That was put in there just as general information showing possibilities, but that could not be construed by any of our officers as meaning that the authority which we received would permit that to be done. I do not interpret it as saying that what our road proposed is to go to the bay.

The map attached to the authority shows a projected line out into the bay, and alongside the property of the San Mateo Docks Company. This authority went through my hands. At that time, to be perfectly frank, I did not expect that some time our railroad would extend according to the way I approved the map. It showed a possibility; that was the intention, to show a possibility there. At that time I contemplated the possibility of a track going to the bay, but I did not contemplate that a line would be built across the Rose property beyond it across the property of the San Mateo Docks Company or property adjacent thereto and to reach the deep-water channel of San Francisco Bay. I did contemplate it as a possibility and the plan showed such a possibility.

The only reason so far as I know that these authorities for expenditures were changed was that the place of junction with our main line was to be different, at least, that is, the [140] impossibility of carrying out the first plan was the reason for the first revision. The reason for the second revision was that in developing the details of getting a right of way from the Salt Company difficulties arose as to what we were going to do with a cooling pond on

(Testimony of W. H. Kirkbride.)

the Salt Company's property. It was finally decided that we would construct a modern tower so that the water could be cooled instead of being sprayed out into the pond. There were other details. There was the lease whereby the Salt Company had a little road on our property in front of the plant and our track construction interfered with it. Also the development of the scheme whereby it was decided to continue the spur-track out to the limits of the Rose property. I recommended these modifications as well as the others shown by the three authorities for expenditures, and at the time these expenditures were recommended they represented what I expected my road to do as therein delineated.

In determining what is a spur-track and what is a switching track as opposed to an extension, I take into consideration the character of territory into which the track extends. If I were building a track into territory that was part of a community we were already serving by our main lines, and by our house track, and by our passenger stations, and by our freight-houses, I would not consider it an extension. If a line were extended in order to serve new communities, and it was necessary to establish rates in order to properly handle a railroad business that would come out of those places, then I would call it an extension. The direction in which the track extended would make some difference in determining whether it was an extension. If I had an existing line 10 miles long with a new line at

(Testimony of W. H. Kirkbride.)

right angles 100 miles long, it would make no difference in that case. If the new track was built in the middle of the 10-mile track and went off a considerable distance into new territory, whether it would be an [141] extension would depend on whether there was any occasion for development of stations on it and if there was no station proposed on the line no matter how long it might be it could not be an extension, and if there were no communities to be served on the lines but it was expected that new business would be built up along it I do not think I would call it an extension. I do not mean to say that whatever its length, say 100 miles, into an unoccupied territory, that it could not be an extension from my point of view. I don't see how you can build a railroad into territory as great as that, manifestly there would be developments and populations which would demand service such as is given on a railroad. The character of the territory to be served may have something to do with whether the line is an extension or not, and if a new line were to pierce a considerable trackage of vacant territory the character of the territory alone might be a determining factor in the hypothetical case put. I think the fact that the line to be built is not served by telegraph service or does not carry any express or mail or passenger traffic and does not carry any less than carload lots, that series of facts in my mind necessarily determines the line is not an extension, so that a road, however long, if it were not served by facilities in the existing community,

(Testimony of W. H. Kirkbride.)

it would not be an extension. From my point of view, if a line were extended in order to serve new communities and it was necessary to establish rates in order to properly handle a railroad business that would come out of those places, then I would call it an extension, but without the characteristics I have just described I do not think it would be an extension no matter how long it might be or however virgin the territory it might serve, and this track contemplated and partially constructed in San Mateo which we have under consideration here would remain, from my point of view, a spur however long it might be or however far up and down the Peninsula constructed north or south, provided only there was no less-than-carload [142] service given upon it and there was no express or mail or passenger service given on it, no telegraphic service in connection therewith and no station thereon. You have asked me a question that I believe could not be carried out. I think it is due to me to say that I cannot imagine a situation developing such as you have described. The construction work on the new track was, considering the problems involved there, done in the usual and ordinary way in every particular that such a track would be constructed. Under our present conditions we do not pay as much attention to push-car methods of building tracks as we formerly did, due to the fact that we now have modern tools to work with, such as caterpillars and autotrucks for the distribution of material. I stated an example in connection with a job

(Testimony of W. H. Kirkbride.)

south of Walnut Grove that I recently observed, where an autotruck was distributing ties four miles away from the rail-head. It is becoming more and more our practice to snake rails quite a considerable distance by means of caterpillars. To give another illustration, we have just finished the construction of quite a bit of track at the south approach to our Suisun bridge where we are building and all of that rail was snaked up there by autotruck—in that case on caterpillar tractors. In the case of the Rose track, it was impossible to handle material along this drainage ditch that was filled up with sewer water. I would not say that it was an ordinary method of construction to take rails beyond a rail-head by means of an automobile or caterpillar. I did not intend to testify in answer to Mr. Durbrow's question that this track was built in exactly the usual way in so far as the handling of rails was concerned, but it was not the first time this proposition was ever thought of although in some respects it was unusual. I do not think the manner of handling the rails was unusual in view of the fact that we had modern tools to work with and the fact that I was building the track with expedition. We have usual and [143] unusual methods in constructing tracks. This method would have to be classed as unusual. Considering the problem involved it was not unusual to commence the construction of the line 2,500 feet away from the tracks with which we proposed to connect. I consider that a very good way was worked out there in con-

(Testimony of W. H. Kirkbride.)

nection with building this track. We had construction difficulties where the track leads off from the main Southern Pacific line. We found it more convenient to commence work at another place at some additional expense. We have a level ground about 2,000 feet from the main tracks, and beyond this level segment we ran into more terrain. The red line which is shown on Exhibit "C" delineates the line I propose to build, with the exception that temporarily we were going to put in a curve leading to the north. The map does not delineate all of the track. The tracks along the main line at the northerly end of the track are industrial spurs. There is no drill track there but there is a team track. An industrial track serves industry; a team track is provided with a driveway alongside of it whereby teams can approach the side of a car and material be loaded in and out of a car on to a vehicle.

We are now using 90-lb. rail in the Tillamook branch in Oregon and on the line that leads to Owenyo. The Tillamook branch is about 125 miles long. The Owenyo line where we are now taking up 62-pound rail and replacing it with 90-pound rail is over 100 miles long. The rail we are now using on the Tillamook branch and on the Owenyo branch is re-lay rail.

We discontinued the use of 90-pound rail on the main line in 1922. All of the rail that I am laying in the main line is 110-pound rail on tangents and 130-pound rail on curves, unless the curve is a very slight curve, and then 110 is used. We do not buy

(Testimony of W. H. Kirkbride.)

90-pound rail to lay on branch lines. You will understand by that, Mr. Mannon, that we do have 90-pound rail in [144] our main line, but we are not buying any more 90-pound rail; as that 90-pound rail wears out we remove it and use it elsewhere. We have 90-pound rail in our track between here and Los Angeles; we have 90-pound rail in our track between Los Angeles and El Paso; we have 90-pound rail on our Shasta Division. We are removing it as rapidly as we can. For instance, my program for 1929 means the laying of 425 miles of new rail in the main lines, and the laying of 140 miles of second-half re-layer rail in branches, and yards, and sidings, replacing the old light rail.

We have over 3,000 miles of 90-pound rail in use on our main line, that is, on the Shasta Division and between here and Los Angeles and in the El Paso division. We also use a good deal of 80-pound rail and 75-pound rail on branch lines.

Seven by eight ties are the ties that we use in all sidings and branch lines, the exception being at important passing sidings adjacent to the main line. They take the main line size, namely 7 by 9. A main line is practically laid with 7 by 10 ties. Very recently we have gotten started on a 7 by 9 tie for our main lines. We use the same size ties on a branch line as we do on sidings and spurs. The ties which we are installing on the Rose track are the same character of ties as are used on our branch lines.

There is a drainage ditch that this Rose track line

(Testimony of W. H. Kirkbride.)

crosses. It is a very small ditch that will take a 12-inch or 18-inch pipe. The rails run across this drainage ditch without any support.

We usually build the tracks parallel to the main line if they are to be used by the local freights. I do not consider that the track on the Rose property would be available for general railroad purposes, except for the local freight in doing its work properly on the main line might temporarily switch a few cars down the lead and then pick them up again, in order to cut in or out from the local freight. If such [145] occasion arose—and I cannot imagine that it would arise—it would be used. It would be used only by a road engine or switching engine moving up and down with cars to the industry.

In connection with the construction of this track on the Rose property there was a confirmation of instructions to go ahead which were verbal. There were not reports made by me in writing prior to the time of the last change in the authority for expenditure.

We have never made a lay-out on the map of any tracks to the San Mateo Docks property. I am slightly familiar with the property to the south of that known as Brewer's Island. I do not recall ever having seen any maps of our company showing any proposed development of that property. There are no plats or maps of my company showing proposed development of the territory lying to the easterly of the Rose property either abutting it or submerged by the waters of the bay.

(Testimony of W. H. Kirkbride.)

On Recross-examination by Mr. DURBROW.

It is contemplated that the switching over this spur-track will be done as follows:

The local freight, in performing its station work at San Mateo, and which is done during the midnight hours, along between one and three A. M., would set out its local freight train on the passing siding, and then the crew, in connection with spotting up on the various industrial spurs and house-tracks at San Mateo, would go in on the Emma Rose spur, and if it were necessary to go down at the easterly end thereof in order to serve some industry they would proceed under control, that is, the engine would be coupled on to the cars, and a brakeman would be riding on the top of the cars, and a brakeman would be on the engine, and they would take out the loads and spot-up the empties at any industry. In crossing any road that might be existing [146] across the spur they would proceed absolutely under control. As I stated yesterday, they would not be permitted to switch any cars across a road, or a highway, or a street, without having control of the car through coupling with the engine. A brakeman would ride the end of the cut opposite to the locomotive, and would flag the crossing. That is the custom and that is the instruction. That is the same way in which they make switching movements right in front of the Ferry Building in San Francisco on the Belt Line, except that on the Belt Railroad in front of the Ferry Building they have long cuts of 30 to 60 cars

(Testimony of W. H. Kirkbride.)

or more. In this particular case there would never be, in my judgment, more than six cars coupled to an engine.

Switching movements would be performed because our double track main line is very busy with passenger trains during daylight hours. We, therefore, confine our freight movements principally to the night hours. The communities south of the Bay Shore, which is the San Francisco freight terminal yard, are served by a local freight that leaves Bay Shore about midnight. It proceeds southward, doing the station switching at Burlingame, and San Mateo, and Belmont, San Carlos, and Redwood City.

What I meant by station work was all car switching at any industries that might exist. That would be the same manner in which we would do the switching on this spur on the Emma Rose property, by the local crew of the freight train until such time that business might justify a switch-engine, but that is a very long time in the future.

I have a statement which shows the amount of second-hand rail in stock at West Oakland and at Los Angeles as of September 1, 1929, as follows:

At West Oakland:

Second-hand 90 pound rail...29.60 track miles
Second-hand 80 pound rail... .38 track miles
Second-hand 75 pound rail... .85 track miles

[147]

At Los Angeles:

Second-hand 90 pound rail... 4.32 track miles
Second-hand 80 pound rail... 1.28 track miles

(Testimony of W. H. Kirkbride.)

Second-hand 75 pound rail. . . .27 track miles

Total:

Second-hand 90 pound rail. . .33.92 track miles
Second-hand 80 pound rail. . . 1.66 track miles
Second-hand 75-pound rail. . . 1.12 track miles
Making a total of 36.70 track miles.

In building sidings, spurs and industrial tracks we use the available second-hand rail that we have.

Mr. W. H. KIRKBRIDE, recalled for plaintiff testified as follows:

On Direct Examination by Mr. MANNON.

With respect to my statement that the switching movement on this track would consist of trains of not more than six cars, I base my opinion on my general knowledge of the requirements of industries and how they are switched. This of course would depend upon the number of industries that are served and the amount of traffic from each industry. In view of the fact that I do not know what the prospective industries may be, my answer is predicated only upon my general knowledge. I have a general knowledge with respect to what you call these imaginery industries. I was answering a question that was comparable to the switching done in front of the Ferry Building. I know that the switching is done in the same way. I have observed many times the number of cars that are handled there and I know that that usually is not the situation at industrial places.

(Testimony of W. H. Kirkbride.)

This is the original communication confirming the verbal orders to the superintendent to do the work.

Note: The witness refers to a document dated San Francisco, March 23, 1929, marked "Mailgram," to Mr. E. R. Anthony, San [148] Francisco, and it is marked "Personal," and is signed W. H. Kirkbride. This document was received in evidence as Plaintiff's Exhibit 15. It is as follows:

PLAINTIFF'S EXHIBIT No. 15.

San Francisco, March 23, 1929.

"Personal . . .

"Mr. E. R. Anthony . . . San Francisco.

"We have consummated the deed transaction and agreement with the Emma Rose Estate whereby we secure certain rights of way to build a spur track to serve industrial territory. We have not actually consummated the right of way transaction with the Leslie Salt Works, but have the assurance of these people that their Board of Directors will take the necessary action at the next board meeting.

"It is important that we quickly lay the track on the right of way secured from the Emma Rose Estate and we will wish to proceed accordingly. Mr. Mathews has explained the matter to your office.

"This is a matter that we wish to handle with great expedition and at the same time without publicity. K 5.

"W. H. KIRKBRIDE.

"cc-Mr. T. H. Williams . . . Los Angeles.

"Personal."

The next one is a memorandum I sent to Mr.

(Testimony of W. H. Kirkbride.)

Mathews. This was received in evidence as Plaintiff's Exhibit 16. It reads as follows:

PLAINTIFF'S EXHIBIT No. 16.

"March 25, 1929.

"Mr. Mathews:

"I note that Saturday you ordered Coast Division to work their track forces Sunday on building the San Mateo track.

"Sunday work is not permitted and under no circumstances without authority of head of department. Furthermore, this has created the impression that we were trying to steal something. I am sorry you did not take this matter up with me. Please bear this in mind as I do not want any more Sunday work.

"W. H. KIRKBRIDE."

March 25th was Monday, the third day after the commencement of the work. I first learned about the Sunday work from the newspaper upon my arrival at my office at 8:30 Monday morning, and I dictated that upon my arrival at my office. [149]

On Cross-examination by Mr. DURBROW.

Mr. McGanney reported to me with respect to his conversation with Mr. Mathews about the length extending northeasterly of this spur-track as I proposed to construct it. The circumstances were about as follows:

In the preparation of the detail in connection with the Emma Rose agreement and deed, the ques-

(Testimony of W. H. Kirkbride.)

tion arose as to this new toll bridge highway that had just been completed across the Emma Rose property. My recollection is that it was completed about March, 1929. It was represented to me that it was a fill possibly ten feet above the natural surface of the ground, very close to the point where the highway had been elevated to go over Seal Creek, which was a navigable stream. It was furthermore represented to me that there was a large artificial borrow-pit or canal, on the southwesterly side of the toll road, and that the waters of the bay were very close to the embankment on the other side. I argued that it was absolutely a waste of money to endeavor to build the large approach embankment to go up on this highway and then after you did get up on the highway you would have to come down into the water, and that there was no occasion for doing that, and that we should terminate the track construction where the level surface of the ground would meet the right of way of the bridge. That matter was discussed with several people. I also told Mr. Burckhalter what my conclusions were, and he nodded assent. That is the reason why that particular clause or restriction exists in the Emma Rose deed.

On Redirect Examination by Mr. MANNON.

With respect to when the toll bridge highway was contemplated and projected as I recollect it, that was an object that was expedited, and I probably knew about it six months before its completion. I do not think I knew of it before six months before

(Testimony of W. H. Kirkbride.)

its completion. I was invited to go down there on two occasions and look the work over by promoters and builders of [150] the bridge, but I never was able to find time to go down there. It is my recollection that the bridge was built in, well, it might have been a six to nine months' job.

Statement of traffic over the San Francisco Bay Toll Bridge read into the record by consent.

The traffic over the bridge for the first five months of its operation (March 2 to July 31, 1929) was as follows:

Passenger cars	382,604
Passengers	998,992

(The millionth passenger crossed that bridge on August 1.)

Trucks	10,948
Tons of freight	12,181

TESTIMONY OF PAUL SHOUP, FOR PLAINTIFF.

PAUL SHOUP, a witness called for the plaintiff, being first duly sworn by the master, testified as follows:

On Direct Examination by Mr. MANNON.

I have been president of the Southern Pacific Company since January 1st of this year. Prior to that and extending back to 1918 I was vice-president and assistant to the president and the executive vice-president.

I am familiar with the lines of my company in

(Testimony of Paul Shoup.)

San Mateo and San Francisco Counties, California, and with the main double-track line between San Francisco and Los Angeles. In a general way I am familiar with the territory lying to the east of our tracks and extending to the San Francisco Bay and to the channel.

I was advised of the filing of the application by the Western Pacific California Railroad Company for a certificate of public convenience and necessity on July 16th of last year. In a very general way I am conversant with the hearings held on that application in January of this year in San Francisco, and of the proposed construction of the Bay Shore Highway under the [151] act of the legislature of 1923. I had understood that the Bay Shore Highway was going to be built through San Mateo County without knowledge of the destination. The Southern Pacific Company participated in the construction of an under-pass at South San Francisco where the Bay Shore highway passes under our tracks there.

My company has a comprehensive policy for the supplying of railroad service with respect to what is known as the Rose property lying directly east of San Mateo. With the exception of that property we have no plan at all. There has been some discussion of development immediately south of South San Francisco and of some development lying immediately south of the cement plant at the end of the spur-track running eastward from Redwood City, but we have no plans at all for the develop-

(Testimony of Paul Shoup.)

ment of the property at San Mateo point and southerly thereof and running down as far as San Francisco Bay Toll Bridge properties. I know of no discussion concerning the development of the property immediately south of that known as Brewer's Island. As to all of the territory from San Mateo point and extending northerly, there has been some discussion of the development of the property, as I said, immediately south of South San Francisco, involving the Mills estate. That is the property about where the airport is. Between the municipal airport, or the approximate location of it, and extending southerly along the Bay Shore as far as the cement plant at Redwood City in the territory bounded on the west by our main line tracks and on the east by the Harbor Line I do not recollect any project for the development of that property by our company. There have been discussions at various times of plans up and down there, but we have no plans, ourselves, for the development of any tract in there that I remember of.

I had no knowledge of the track partially constructed in the City of San Mateo near the southerly boundary, and on the [152] Rose property on March 23 and 24 of this year. I had knowledge of the fact that this spur-track was authorized, that the construction was authorized.

I did not know of the execution of the deed from Emma Rose to our company, I don't follow the details of those matters. Mr. Dyer, the vice-president and general manager, is in general charge of that work; then Mr. Burckhalter, reporting to

(Testimony of Paul Shoup.)

Mr. Dyer; and then Mr. Kirkbride, engineer of maintenance of way, reporting to Mr. Burckhalter. That is the chain that leads to my office.

So far as I know, there is no present demand from any industries for the construction of the track on the Rose property. The authority for expenditure that is already in the record covers substantially my knowledge of the situation.

Mr. Shoup's statement to the Press, dated April 1, 1929, was received in evidence as Plaintiff's Exhibit No. 9.

It was as follows:

PLAINTIFF'S EXHIBIT No. 9.

"Spur-tracks to meet the industrial growth of California and the Pacific Coast generally are being laid all the time, by agreement between the railroads, the property owners and industries, and without question of public authority being involved. If it be necessary to cross streets, then the necessary public authority has to be obtained.

"This is done at the rate of many hundreds a year by the Southern Pacific Company alone in the normal course of business, and without public discussion being involved.

"In the instance of the drill track being built solely for this purpose by the Southern Pacific from its peninsula line south of San Mateo eastward into what is known as the Emma Rose Properties, there has been much publicity created and such a variety of statements made that it is desirable the public generally should know the facts.

"The Southern Pacific Company from time to time has announced its willingness to co-operate in the establishment of industries on the peninsula either with property owners who might secure industries, or directly with such industries. Pursuant to that policy it has built generally industrial spurs from which industrial tracks could be extended for use by any new industry. Pursuant to this policy, on September 1, 1925, the manager of the Three Cities Chamber of Commerce, the industrial agent of the [153] Southern Pacific and the manager of the Emma Rose properties appeared before the city council of San Mateo calling attention to the opportunity of placing industries on the vacant lands lying between San Mateo and San Francisco Bay. They were authorized to state, and did so, that the Southern Pacific was ready to make this territory available by building an industrial drill track, the right of way to be furnished by the Rose interests. The manager of the Chamber of Commerce urged that the city co-operate in the closing of certain unoccupied streets, the adjoining property all belonging to the Rose interests, so that this might become industrial, and that the drill track might be built without reference to street lines that existed only on paper. A committee was appointed by the council to deal with the details of the proposed plan. The proposition was enthusiastically received. The original plan involved the crossing of Ninth Avenue, but the present plan does not call for the crossing of any street. On

December 22, 1925, the city manager of San Mateo stated that as a condition precedent to taking favorable action, the city would require the Southern Pacific to build a subway under its main line tracks on Ninth Avenue. Within a week, the manager of the properties to be served accepted the demands of the city, but both he and the engineers of the railroad presented their conclusion that there was no need of a subway under the main line tracks at Ninth Avenue at this time, and whenever there was such a need that question should be disposed of on its merits.

"In connection with such separations the Railroad Commission is the arbiter as to the necessity of the division of expense.

"Negotiations between the city manager and representatives of our company proceeded throughout the year 1926 in an effort to reach an understanding, but the city manager insisted that the subway be built as a condition to granting of the permit. While no definite plans of the subway were prepared, approximate estimate, based on similar situations, showed the cost would be about 175,000, with the possibility that it would be greater, depending on the property damaged, all of which expenses the city requested the railroad to bear. As it appeared that no agreement could be reached between the city and the railroad which did not involve the railroad in a very large expense, and which it normally would not be called upon to bear except in part, effort was made to avoid the difficulty

by locating a new route for the purpose of serving the Rose property for which it was believed that industries could be readily secured. This track, by extension, also made available properties beyond.

"Such a route was found, deeds drawn up covering the right-of-way for the railroad company, the title searched for that section involving the Rose properties, the report showing that there were no rights to other parties involved except an easement granted to the power company for its lines. Very recently it was discovered that an easement to an individual had been granted for a sewer line, but there is no record of any conveyance of this individual easement to the city of San Mateo. This sewer easement crosses the proposed right of way at one point. [154]

"The owners of the Rose property arrived in San Francisco early in March of this year, and agreement was finally reached with them and papers conveying title to the right of way passed on March 21. The understanding was that the railroad would proceed immediately with the construction of the track which had been long delayed, and that it had to be completed within six months.

"It will thus be seen from the foregoing record that the plan of the Southern Pacific to serve these properties was developed some years ago, responsive to the demand that rail facilities be given for industrials development on the peninsula, and that it was not planned nor intended to interfere with any other public development of any kind what-

soever. So far as any other railroad is concerned it does not mean any obstruction in its way. No other railroad owns any rights of way crossing this projected line. Whenever the Western Pacific or any other railroad company secures the right to build a line down the peninsula it will have no difficulty whatever in crossing this industrial spur. The power rests with the Railroad Commission to determine not only the desirability of any such crossing, but the terms under which it shall be made.

"As for the state highway, the Southern Pacific has a long record of full co-operation in helping carry out the highway plans of the state. We made the reduced rates necessary in the early days to help establish this highway system. We have co-operated in the separation of grades, and in the exchange of properties, including our rights of way and other properties for the purpose of making practicable the state's extension plans. There is no thought or intention on our part of making numerous crossings of the longitudinal highways of the peninsula with spur tracks or other tracks. We desire to avoid such crossings probably just as the Highway Commission wishes to have them avoided. There are situations, however, where the ideal condition cannot be attained with justice to all interests.

"Many of the peninsula communities and the business interests of the entire peninsula generally, have expressed themselves as being very desirous of having industrial development along the Penin-

sula Bay Shore. At this time there is no highway to be crossed; indeed no right of way for a highway has been secured. It is proper to say, however, that it is generally understood that the highway is to be extended southward in a location that would cross this spur track.

"The question then arises: Is it the best public policy to shut off from rail connection large areas that can best be used for industry, and that are not attractive from a residential viewpoint, or is it better to permit a very few industrial track crossings of the locations where such highways are to be built with proper safeguards as to switching of cars across the highways? If these few industrial spurs were built, across which the highways would be constructed later, then north and south extensions of these industrial spurs paralleling the highway would avoid the necessity of any additional crossings. [155] The switching of cars across the highway would, of course, be regulated with not only adequate safety provisions, but with the policy of the least possible inconvenience to the traveling public. We believe that such an understanding can be worked out satisfactorily with the Highway Commission, subject to the approval of the Railroad Commission. It should be clearly understood that there would be no fast railroad movements across these tracks, and no freight or passenger train movements; simply the switching of freight cars necessary to the operation of the industries.

"As for the question of sewers that has been

(Testimony of Paul Shoup.)

raised: that is too small a matter to talk about. Sewers are located under railroad tracks in innumerable places.

"I would suggest to our friends on the peninsula that they study this situation very carefully before reaching a conclusion as to what is to the best interests of the entire section. We believe from our experience elsewhere that any industry on the Peninsula will want Southern Pacific service irrespective of any other railway service."

Prior to the issuance of this statement I remember talking with Mr. Kirkbride about it, and asked him with respect to the facts after this publicity, I think, was in the papers. I do not remember talking with Mr. Burckhalter, though I might have done so. This statement sets forth the facts as I knew them and embodies my view of what must be done by the company.

What I say in the statement is:

> "The Southern Pacific Company from time to time has announced its willingness to co-operate in the establishment of industries on the Peninsula, either with property owners who might secure industries, or directly with such industries. Pursuant to that policy it has built generally industrial spurs from which industrial tracks could be extended for use by any new industry."

It is our policy to co-operate with industries in the building of spurs.

Farther on in the statement I said:

(Testimony of Paul Shoup.)

"As it appeared that no agreement could be reached between the city and the railroad which did not involve the railroad in a very large expense and which it normally would not be called upon to bear except in part, effort was made to avoid the difficulty by locating a new route for the purpose of serving the Rose property, for which it was believed that industries could be readily secured. This track, by extension, also made available properties beyond."

Replying to your question as to the properties beyond the [156] Rose tract, the original plan which I had in mind at the time, as I remember it, called for the extension of tracks to serve some 36 acres. I did not know how far these Rose properties extended at that time when I made the statement. I think I was in error in making any statement with respect to properties beyond the Rose property. I found out subsequently that the Rose properties extended pretty well toward the bay.

I also said in the same statement:

"Such a route was found, deeds drawn up covering the right of way for the railroad company, the title searched for that section involving the Rose properties, the report showing that there were no rights to other parties involved except an agreement granted to the power company for its lines."

I correct the statement just read to the following

(Testimony of Paul Shoup.)

extent: My personal familiarity with the detail was not very great, and while the right of way I knew was being secured from the Rose properties, I did not know how far the Rose properties extended, nor, for that matter, whether it extended all the way across. At that time I did not go into the detail of it very far. At the time this statement was issued, so far as I, as chief executive of the company, knew, the company's intention was to build in accordance with the authority. And I had made no change in this plan.

In my statement I also said:

"The question then arises: Is it the best public policy to shut off from rail connection large areas that can best be used for industry and that are not attractive from a residential viewpoint, or is it better to permit a very few industrial track crossings of the location where such highways are to be built with proper safeguards as to switching of cars across the highways? If these new industrial spurs were built across which the highways would be constructed later, then north and south extensions of these industrial spurs paralleling the highway would avoid the necessity of any additional crossings. The switching of cars across the highway would, of course, be regulated with not only adequate safety provisions, but with the policy of the least possible inconvenience to the traveling public. We believe that such understanding can be worked out satisfactorily with the Highway

(Testimony of Paul Shoup.)

Commission subject to the approval of the Railroad Commission. It should be clearly understood that there would be no east railroad [157] movements across these tracks and no freight or passenger train movements; simply the switching of freight cars necessary to the operation of the industries."

This was not a statement of any policy which our company has considered or adopted with regard to the territory there under discussion. I was asking that as a question as to whether that would be the better public policy. I was asking the question, is it not better to permit crossings over the highway, this highway or other highways of like nature, at whatever proper points might be necessary, which of course would be limited as much as possible, and then through these switching tracks, to permit the development of the property on the other side of the highway. The facts upon which the statements in the paper were based were obtained from Mr. Kirkbride. I cannot tell from whom I got the information on which the following statement in the article was based:

"As it appeared that no agreement could be reached between the city and the railroad which did not involve the railroad in a very large expense, and which it would normally not be called upon to bear except in part, effort was made to avoid the difficulty by locating a new route for the purpose of serving the Rose property for which it was believed that industries

(Testimony of Paul Shoup.)

could be readily secured. This track, by extension, also made available properties beyond."

I presume I got the information on which the newspaper statement was based from Mr. Kirkbride immediately before such statement was issued on April 1st. The statement is a result of my discussion with Mr. Kirkbride and whatever other information I obtained from other people and my own views.

With respect to your question concerning where I got the facts upon which my statement was based, "I talked with Mr. Kirkbride after this newspaper publicity."

"Q. So far as you recollect now, was Mr. Kirkbride the gentleman you got your information from on this subject?

A. I got the major part of it from him. I don't remember discussing it with anybody else. * * * I presume it was immediately before this statement was issued. I looked into the question naturally after this newspaper publicity to find out about it." [158]

Industrial switching spur is the term we usually use where we build tracks of this nature and then serve industries through connecting industrial spurs. It is called a drill track, indicating a track where cars would be moved up and down in the process of being switched on the industrial spurs. That is the usual term in our railroad practice.

(Testimony of Paul Shoup.)

On Cross-examination by Mr. DURBROW.

The purpose which the Southern Pacific Railroad Company sought to accomplish by constructing the track under construction was to serve these 500 or 600 acres lying east of San Mateo with this industry track, and to secure industries on that property. The Southern Pacific Company has no intention of extending the track in any direction. Where that is a part of any plan, that is to say, a further extension of any track that is not contemplated at the time, it is necessary, under our regulations, to deal with the fact of any further contemplated extension, even though an appropriation is not asked, in order that we may know what we are involving ourselves in with respect to the future. The project is completely and finally outlined in the authority for expenditure which has been issued and approved and is complete in itself. It was the intention originally to extend it to the boundary of the Rose property. That was before the San Francisco Bay Toll Bridge was projected, and it is intended now to extend it simply to the toll bridge right of way. This project is in accord with our general policy of constructing tracks of this nature where there is a prospect of the property that is being served being developed for industrial purposes.

On Redirect Examination by Mr. MANNON.

I only knew, of course, what I had authorized under my individual authority, and under the action of the executive committee. The matter of the toll

(Testimony of Paul Shoup.)

bridge is of very recent [159] development, so far as I am concerned. I had knowledge of the length of the spur as shown by the request for authority to build it. At that time, no doubt, I had a casual knowledge of where it was located—from the map that would be submitted with it. The authority for expenditure then fairly represented what my knowledge was with regard to what my company was going to do. The questions asked me by Mr. Durbrow about the details do not necessarily conflict with the authority for expenditure. We do not have to spend all the money we are authorized to spend. I said that my understanding was that we did intend originally to cross the toll bridge highway; that it was going to the edge of the Rose property. I had no knowledge of the toll bridge highway at that time. The construction which I understood my company was going ahead with was to the edge of the Rose property, but naturally we stop now in view of the obstruction that is placed there. In fact, there is very little property beyond that obstruction in the shape of the toll bridge highway, which is on a fill, I believe, so the engineers tell me. We don't always follow the authority rigidly that may be granted, because new problems come up, and they may have some new ideas, the officers, as to changes in plans—any of our officers, and sometimes I develop some of my own.

The purpose of my company as far as I know is fairly represented by the authority for expenditure, except, as I have stated right now, that we would

(Testimony of E. S. McCurdy.)

not build beyond the right of way of the toll bridge. I said I did not know so very much about the detail. It only has been very recently that my attention was brought to the fact that this spur, if constructed as planned, would have to cross this right of way, and really it is the highway, and if it did so it would serve very little property beyond, and I simply said that is as far as we will go. That has been within the last week, I think. As soon [160] as my attention was called to the toll bridge right of way I concurred in what I might say was a recommendation to our officers that we should not go any further. They might have reached the conclusion, so far as they were concerned, some time before. That I do not know. By virtue of my official position, I would have the authority to restrict the exercise of the authority given in the original authority which directed or authorized an expenditure to a point farther than that which has now been determined upon by me. I would report it, of course, in due course to the executive committee. [161]

TESTIMONY OF E. S. McCURDY, FOR DEFENDANT.

E. S. McCURDY, a witness called for the defendant, being first duly sworn by the master, testified as follows:

On Direct Examination by Mr. DURBROW.

I am an engineer. I am familiar with the Emma

(Testimony of E. S. McCurdy.)

Rose property and I have had something to do with it in connection with the development of industry. I first considered it from an industrial standpoint in 1920. I don't think we had any negotiations with the Southern Pacific Company until about 1921. The first negotiations we had with that company were relative to putting in an industrial track to serve the area or such portion of the area as we might dispose of to an industry of worth. These negotiations were conducted jointly by the Tri-Cities Chamber of Commerce, and myself, through correspondence. Those were the first negotiations. They were with respect to the possible location of the Illinois Pacific Glass Company in San Mateo on this property. In September, 1925, I had negotiations with the officials of the Southern Pacific Company and the city of San Mateo and the Chamber of Commerce. Those involved were The San Mateo City Council, Mr. Weissgerber, the city manager of San Mateo; Mr. Frye, an industrial agent of the Southern Pacific; Mr. Dawson, an engineer of the Southern Pacific; Mr. Imboden, the chairman of the Tri-Cities Chamber of Commerce. I think that is all. We held several informal conferences culminating in a meeting at which the above-named were present in San Mateo in the City Hall, before the City Council, or a committee appointed by the City Council. I think it was before the City Planning Commission. It was relative to the location of a drill track, in the first instance, between Tenth and Eleventh Street, and relative

(Testimony of E. S. McCurdy.)

to the closing of all or certain streets between Tenth and Eleventh Streets, so that industries could be placed facing Tenth and Eleventh, with their backs toward the drill track.

The first proposed route is shown in red on a map which has been introduced in evidence and attached to authority for expenditure, [162] Exhibit No. 5, a projected spur-track extending from the main line of the Southern Pacific Company in a general easterly and northerly direction.

After that meeting I wrote a letter, in fact I am sure I wrote a letter to all the parties concerned, including the Southern Pacific Company, I am not sure it was before or after, setting forth the understanding or the sense of the meeting, and I think that Mr. Weissgerber, as city manager, replied to that letter, stating that the City Planning Commission would recommend to the City Council that certain things be done relative to closing the streets providing Emma Rose would do certain other things relative to widening certain other streets, and providing for some other matters. I would have to refer to the correspondence which I have here in order to be exact. They also added that all of this would be provisional upon, I believe, Emma Rose assuming the burden of the Southern Pacific Company building an under-pass under their tracks on a line with Ninth Avenue. I think I wrote them and withdrew from that particular location, because of the difficulties, and stated that we could not assume, or rather, that Emma Rose could not as-

(Testimony of E. S. McCurdy.)

sume any obligation to have the Southern Pacific Company do anything; we would be glad to have the under-pass, we owned most of the property, but we could not assume that obligation. We then considered a plan to move the drill track down to a point southerly of Eleventh Avenue, which plan would necessitate petitioning the Superior Court of San Mateo County to close certain streets in blocks 32 to 47, inclusive. This petition was filed, and the City of San Mateo, together with the Highway Commission, protested it. The matter was postponed several times, and on the advice of counsel we withdrew the action, it being counsel's opinion that we would not get anywhere with it, and that we were blocked again; the City Planning Commission of San Mateo was instrumental in preventing me from carrying out my original plan. The City Planning Commission would evidently have to give certain [163] franchises, and that they were willing to do provided we, so to speak, horsetraded back and forth.

I told the Railroad Company that I would grant them a right of way as shown on the map attached to Exhibit No. 5. I was willing to do so and to consummate a transaction whereby title would pass to that right of way as delineated on the map. Following the failure of those plans, I told the Southern Pacific Company that I would grant it a right of way over the property that I have last described. Being unable to carry out these plans, the negotiations which I had eventuated into execution of a

(Testimony of E. S. McCurdy.)

deed by Emma Rose and her husband, which has been introduced as evidence in this case. I had no understanding with Mr. Kirkbride personally; my understandings were all had with Mr. Mathews of the Southern Pacific Company. The track was to be built as it was called for in the conveyance. But if you are referring to the former testimony by Mr. Kirkbride, there was a very distinct understanding with Mr. Mathews. The Southern Pacific Company was able to do almost anything it wanted to do, with that land in the building of that track. I wanted the track, and I wanted it quick, and I didn't care what they did, as long *as left* the land in as good shape afterwards as it was before. I gave them practically blanket authority to use that land for their own purposes in constructing that track in accomplishing their ultimate object in providing a track as called for by that deed. There was not anything written about that. I am very sure that Mr. Mathews raised the point himself that they might want to use certain dirt or dig certain holes for filling, and that it might not meet with our approval. I told him to go ahead. I remember discussing with him particularly the possibility of its being necessary to throw a track into the north on a sharp curve, and I told him that that would be all right. At the time the deed was executed granting this right of way for this industrial track of the Southern Pacific Railroad Company, I had not granted any right of way to the state highway to cross the lands of [164] Emma Rose."

(Testimony of E. S. McCurdy.)

I have endeavored to locate industries upon this Emma Rose property. The first effort was with reference to the Illinois Pacific Glass Corporation, as I have stated before, in 1921. Those efforts amounted to nothing, because it would have been necessary to go through the same procedure as we tried to go through in securing a franchise. Although the Illinois Pacific Glass Corporation officials attended their two meetings in San Mateo and seriously considered the site, the matter dragged along, and they finally refused to consider it any further, and they rehabilitated their present plant here in San Francisco.

The Emma Rose property is suitable for industrial purposes. A great portion of it lies in such manner that it is unnecessary to make fills, though a large portion would need to be filled to be used properly. The land immediately adjacent to and abutting the Southern Pacific Company's main line right of way is not available for industrial purposes because it is a dedicated area, consisting of blocks 32 to 47, which would be necessary to revert to acreage, if that is the proper word, or, rather, to close the streets so that it would be available as industrial land.

According to the original map attached to the authority for expenditure, Exhibit No. 5, it was my intention to extend the line down through those blocks and serve industries on each portion thereof. That assumed the fact that those streets would be closed by the city and county of San Mateo. We

(Testimony of E. S. McCurdy.)

finally filed a petition in court to have them closed, but, as I say, we were compelled to withdraw it, being opposed by the city of San Mateo, as well as by the State Highway Commission. We are still endeavoring to have this area, the streets in it, closed, and I think we will be successful.

On Cross-examination by Mr. MANNON.

With respect to the track drawn upon the map accompanying the first authority for expenditures, the track extending from the Southern [165] Pacific Railroad easterly clear out to the right-hand side of the map, there was some discussion as to running an industrial track in that approximate location. I don't think any property owners but Emma Rose and possibly E. W. McClellan were in on this discussion. I do not know whether the matter was brought to the attention of the San Mateo Docks Company, but I don't think it was. The discussion with respect to this track was occasioned by a survey made at San Mateo prior to 1920 by W. S. Hammett, in which all of the property owners joined to determine whether it would be feasible to build a pier to deep water in order to give San Mateo the benefit of terminal rates. The location shown on Exhibit 5 follows in a general way soundings that were made for that pier location.

The southeasterly portion—southerly and easterly of the Rose property indicated on that plat would require filling for industrial purposes. It would

(Testimony of E. S. McCurdy.)

be necessary to fill about 200 acres of this property to make it first class industrial property.

Practically all negotiations with reference to any track that the Southern Pacific ran out over the Rose property were with Mr. Mathews. We made no effort to assist the railroad in getting any right of way out easterly over any other property except the Rose property. I do recollect, in accordance with the statement in the authority for expenditure, that I told the Southern Pacific Company I would assist them in so far as we could in procuring similar rights of way for a further extension of a drill track across the Rose property but I did not take any action personally. We did not get that far.

TESTIMONY OF JOHN HUNT SKAGGS, FOR PLAINTIFF.

JOHN HUNT SKAGGS, a witness called for the plaintiff, being first duly sworn by the master, testified as follows:

On Direct Examination by Mr. MANNON.

I am a civil engineer and am at present District Engineer, Division of Highways, State of California, the San Francisco district. My headquarters are in San Francisco.

I know a road called the Bay Shore highway. I have had full charge of the location and construction of this road, the preparation [166] of deeds, and the securing of rights of way, and, in fact, all to do with it, subject to the approval of the State

(Testimony of John Hunt Skaggs.)

Highway Engineer and the Highway Commission. I have had that relation to the Bay Shore highway since its inception. My recollection is that the act creating that as a state highway was passed by the legislature in 1921 or 1922. The Bay Shore highway starts at Army and Potrero, in the city of San Francisco, and follows along approximately the westerly shore of San Francisco Bay, or as near thereto as it was practical to locate it, passing through Visitacion Valley, South San Francisco, along the Mills Airport, just to the west therefrom, through Burlingame and San Mateo, and is constructed to Fifth Avenue, San Mateo, at the present time; from there on it is located into San Jose via Agnew, entering West First Street, San Jose.

I do not know the exact population which this highway will serve. I assume the population of San Francisco is about 800,000 and that San Jose is a city of approximately 100,000. Population in between would be hard to guess unless I had figures giving me the populations of the various towns through which the highway passes or near to which it passes.

Mr. DURBROW.—Just a moment, I would like to interpose an objection to the introduction of any testimony relating to this highway upon the grounds already urged, and also upon the ground that it has no place in this controversy, at all. This is a controversy between two railroad companies. The highway is not involved in this controversy in any way, whatsoever. The courts of this state have

(Testimony of John Hunt Skaggs.)

jurisdiction of crossings by that highway of railroads and of railroads by the highways. There has been a special tribunal constituted by the legislature of this state to determine any controversy that might arise with respect to the crossing of that highway. The District Court of this district has held that where a special tribunal has been constituted to determine controversial questions such as that, that resort must be had to that tribunal, and not to a court of equity. I refer specifically to the case of Eureka etc. R. R. vs. California [167] etc. R. R., 103 Fed. 897. That case was affirmed by the Circuit Court of Appeals in 109 Fed. 509.

The MASTER.—Yes. This is but *res inter alios acta,* I take it, to get at the topographical situation of the whole country, and to get at an intelligent understanding of it. In itself, I take it, the question whether a state authority may have a right to grant a crossing is not for our ultimate determination, but it might be sufficiently relative to justify its admission in arriving at the whole situation involved in this controversy. Therefore, I think this is admissible.

Mr. DURBROW.—My objection will be understood to pursue this entire line of examination?

The MASTER.—Oh, yes, certainly.

The minimum right of way secured has been 125 feet. The ultimate plan is for 100-foot roadway with two 12½-foot sidewalks. The graded portion of the highway has a width of 60 feet with prospective pavement of 40 feet. All existing pavement

(Testimony of John Hunt Skaggs.)

is 40 feet wide. I have no estimates regarding the traffic that this highway is presumed to carry.

I made the statement before the district engineer that we expected a maximum of 20,000 machines a day on this highway. That statement was based to some extent on traffic census taken on the portion of this road already constructed and upon the traffic carried by the Peninsula highway. I expect all classes of traffic will be carried by this highway, particularly trucks, due to the fact that it is a low level road, with very direct alignment and passes around rather than through cities. The highway is shorter between San Jose and San Francisco than the present road and it passes through less populous areas and is the quickest entrance to the industrial section of San Francisco. The Peninsula Highway (El Camino Real) and the Skyline Boulevard serve the district between San Francisco and San Jose. It is expected that the traffic on the Bay Shore highway will [168] be faster due to the lack of interruption. It is our experience that vehicles travel on highways probably at a speed in excess of 40 miles an hour.

In our application for a structure across Redwood Slough I presented certain figures. These figures give the maximum (estimate on Sunday) and minimum (estimate on Monday) counts on the Bay Shore highway and on the Peninsula Highway. I have counts taken in 1928 and 1929 at a station on the Peninsula Highway, approximately opposite the Leslie Salt plant, also counts taken on portions of the Bay Shore highway that are completed:

(Testimony of John Hunt Skaggs.)

The first point of interest on the Peninsula Highway is Uncle Tom's Cabin. The count there was:

Sunday, July 15, 1928—22,208; Monday, July 16, 1928—9,205.

Sunday, Jany. 13, 1929—16,560; Monday, Jany. 14, 1929—6,962.

Sunday, July 14, 1929—23,843; Monday, July 15, 1929—11,468.

The count at 16th Avenue, southerly limits San Mateo (Peninsula Highway):

(Practically all peninsula traffic over highway at this point.)

Sunday, July 15, 1928—29,163; Monday, July 16, 1928—12,698.

Sunday, Jany. 13, 1929—18,956; Monday, Jany. 14, 1929—8,896.

Sunday, July 14, 1929—27,084; Monday, July 15, 1929—15,124.

Count at station northerly city limits, Redwood City (Peninsula Highway):

Sunday, July 15, 1928—25,474; Monday, July 16, 1928—11,771.

Sunday, Jany. 13, 1929—17,309; Monday, Jany. 14, 1929—8,072.

Sunday, July 14, 1929—23,944; Monday, July 15, 1929—12,851.

Count at station Federal Telegraph Co., Palo Alto (Peninsula Highway):

Sunday, July 15, 1928—18,700; Monday, July 16, 1928—8,774.

(Testimony of John Hunt Skaggs.)

Sunday, Jany. 13, 1929—11,667; Monday, Jany. 14, 1929—5,692.

Sunday, July 14, 1929—19,957; Monday, July 15, 1929—10,284.

Count on Bay Shore Highway at South San Francisco: [169]

Sunday, July 15, 1928—10,097; Monday, July 16, 1928—4,321.

Sunday, Jany. 13, 1929—7,736; Monday, Jany. 14, 1929—3,329.

Sunday, July 14, 1929—10,434; Monday, July 15, 1929—4,840.

Count at station at Broadway, Burlingame (Bay Shore Highway):

Sunday, Jany. 13, 1929—7,248; Monday, Jany. 14, 1929—2,860.

Sunday, July 14, 1929—10,268; Monday, July 15, 1929—4,776.

We estimate that the Bay Shore highway will probably be through in the course of three or four years. We thought when opened the Bay Shore highway would carry 12,500 machines. This estimate was prefaced on minimum and maximum counts that we have and a probable 15% increase per year. The Skyline Boulevard is not contemplated to be as direct a line to San Francisco as the El Camino Real or Bay Shore highway. The termini of the Skyline Boulevard is different from that of El Camino Real and the Bay Shore highway. The Skyline Poulevard is slightly longer than the Peninsula Highway. We feel, however,

(Testimony of John Hunt Skaggs.)

that the Skyline Boulevard will relieve some traffic on the Peninsula Highway as it allows people to go one way and return another. I do not remember the estimates of the traffic for Skyline Boulevard and the stations for counting traffic on that highway are not comparable to those on the Peninsula Highway. The elevation of the Skyline Boulevard is greater than the other two roads and ranges from 20 to 30 feet above sea level to 2,500 feet, two-thirds of which would probably be 1,000 feet or better.

There was received in evidence at this time as Plaintiff's Exhibit 11 a certified copy of map showing the definite location of the Bay Shore highway entitled "State of California, California Highway Commission, plan and profile of proposed state highway in San Mateo County through San Mateo," dated October 9th, 1926.

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

I am not acquainted with the actual boundaries of the Rose property. I know where a portion of this property lies. The southern [170] boundary of the city of San Mateo is the end of this lay-out, designated Station 728 plus 80.73. The beginning of this particular lay-out is at station 612 plus 92.44, which station is the southerly property line of Peninsula Avenue, San Mateo. Fifth Avenue, San Mateo, is shown on this plat (Plaintiff's Exhibit 11). The highway has already been constructed in part at least to Fifth Avenue, in San Mateo. The main line of the Southern Pacific Railroad is westerly, approximately, parallel to the

(Testimony of John Hunt Skaggs.)

highway lay-out. Probably three-quarters of a mile westerly from the highway. The Bay Shore highway, in the main, is to the east of Southern Pacific track, between San Francisco and Los Angeles. North of South San Francisco the Bay Shore is westerly from the Southern Pacific tracks; at South San Francisco it goes under the Southern Pacific Railroad, and remains east of the Southern Pacific main line from there on to San Jose. The highway was located east of the Southern Pacific to avoid crossing its tracks. The sheets following the first sheet of Exhibit 11 are detailed sheets of the highway. Surveys for the Bay Shore highway through San Mateo were started the latter part of December, 1923. The right of way, itself, has never been staked out, except as requested by property owners, or for the purpose of re-establishing fence lines, and things of that kind. As a rule, it is not necessary to do that. When the right of way is actually staked out on that it is usually following construction. In fact, our contracts embody an item for setting the monuments during and after the completion of a contract, and during that time monuments are set on the right-of-way boundaries. The center line survey is the base line survey, and, naturally, is the first survey we make, and is the one from which practically all the data is secured to tie to records, and maps, and office work. When the survey is made stakes are put on the ground to indicate the center line. The center line survey was made through the city of San Mateo and southerly

(Testimony of John Hunt Skaggs.)

of Fifth Avenue therein in December, 1923. We have already constructed the highway as far south as Fifth Avenue in San [171] Mateo. Rights of way have been acquired for the greater portion of the highway as far as Palo Alto. The right of way over the property in San Mateo south of Fifth Avenue along the line of the Bay Shore highway has not been secured, because it belongs to the Emma Rose Estate, and they have not been willing to give us a deed to it. We have an order at the present time authorizing us to condemn a right of way through that section. Of course, condemnation matters are acted on by the Department of Public Works and the Highway Commission. Naturally, as a rule, I am informed as to those matters. After condemnation proceedings are instituted it is a matter for our legal department to handle. A certified copy of documents in evidence, Plaintiff's Exhibit 11, which I have examined constitute a definite location of the Bay Shore highway in that immediate vicinity. The road is also located southerly of San Mateo by other plats than these that are here in evidence. The Highway Commission has adopted an index sheet for the entire route to the city limits of San Jose. The detail maps have not been approved. There has been public objection by some of the Highway Commission to the spur-track that is in course of construction crossing the Bay Shore highway at grade.

TESTIMONY OF W. G. PORTER, FOR DEFENDANT.

W. G. PORTER, a witness called for the defendant, being first duly sworn by the master testified as follows:

On Direct Examination by Mr. DURBROW.

I am chief engineer of accounting, Southern Pacific Company, in the valuation department. That department has to do with the valuation of properties of the Southern Pacific Company by the Interstate Commerce Commission. My particular duties, are regarding authorities for expenditures and completion reports, recording the completion of property changes. That work is done in compliance with the requirements of the Commission's Order No. 3, which was issued on January 1, 1919, and subsequently amended at various times.

A certified copy of Order No. 3 of the Interstate Commerce Commission Bureau of Valuation was received in evidence as Defendant's Ex. "A."

Order No. 3, so far as is pertinent to this case, is as follows: [172]

DEFENDANT'S EXHIBIT "A."

"Regulations and Instructions to Govern the Recording and Reporting of all Extensions and Improvements, or Other Changes in the Physical Property of Every Common Carrier.

"General.

"(1) That the Commission may be enabled to

comply with that portion of section 19a of the act to regulate commerce reading—

"'Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several states and territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session'—a uniform system of records, which shall be established by carriers, is here prescribed. In these records it is intended that carriers shall record the extensions, improvements, or other changes that are made in their physical property after the date fixed by the Commission for the inventory of that property. For convenience, the extensions, improvements, or other changes in physical property are hereinafter referred to, individually and collectively, as property changes. From the records prescribed certain reports hereinafter indicated shall be prepared by carriers and filed with the Commission.

"(2) The records which compose the system that shall be established are here listed:

"1. Authority for Expenditure . . . 'Exhibit A.'"

(Testimony of Daniel C. Imboden.)

"AUTHORITIES FOR EXPENDITURES.

"(14) Carriers shall issue an Authority for Expenditure for each change in their property. In so far as possible these Authorities shall be issued in advance of making the property changes. Those covering involuntary retirements of property, or changes effected under stress of emergency, may be issued as and when the changes are made.

"The Authorities issued for roadway and structural changes shall not overlap valuation section limits. Each Authority issued shall describe the change authorized and its location."

TESTIMONY OF DANIEL C. IMBODEN, FOR DEFENDANT.

DANIEL C. IMBODEN, a witness called for the defendant, being first duly sworn by the master, testified as follows: [173]

On Direct Examination by Mr. DURBROW.

I am the general manager of the Mercantile Building & Loan Association. During the years 1921 to 1926 I was the manager of the Three Cities Chamber of Commerce. That was a civic organization functioning like any Chamber of Commerce, composed of a membership largely of people from San Mateo, Burlingame, Hillsboro, and some from San Francisco.

During those years I was acting quite a bit in that capacity with the development of property in

(Testimony of Daniel C. Imboden.)

the vicinity of San Mateo. I had to do with locating industries or providing facilities for industries on the property known as the "Emma Rose Tract." We had an opportunity to locate the Illinois Pacific Glass Company down at San Mateo, and we took the managers of the Glass Company down the peninsula and showed them a location near San Mateo, on the property that belongs to the Emma Rose Estate. We felt it would be a very fine thing to have that industry located at San Mateo, and asked them to buy the property. They were sold on the location in this respect, that the community was fine, the working conditions would be splendid, and they would have ample room to expand their factory as they saw *it*; however, there was a question of freight rates that entered into the consideration of their location on the property, and they felt that the freight rate that would obtain there would be a disadvantage to their locating at San Mateo. The Chamber of Commerce then believed it would be a good idea to try to break that freight rate down where it would be on a parity with the San Francisco freight rate. Through the efforts of some people who wanted to establish a factory there on our waterfront, known as the Mineral Metals and By-Products Company, a group of citizens of San Mateo bought up, I believe, what was known as the San Mateo Docks Company. We loaned some money—we took a mortgage on the property, and I believe that we own that property at the present time. We contemplated the develop-

(Testimony of Daniel C. Imboden.)

ment of a port at San Mateo. [174] That was one of our projects. If you will recall, the deep water channel skirts the San Francisco-San Mateo peninsula approximately a very short distance from Brewer's Island. It is 40 feet deep at that point, and a mile wide. That was the place where the bridgehead of the San Mateo-Hayward bridge is. This property that we contemplated the construction of this port on was immediately east of San Mateo, and comprised the tide-lands, some 1,380 acres. We, of course, entered into negotiations with the Southern Pacific Railroad Company, looking to side-track facilities, and that threw me in contact for quite some time with Mr. Frye.

Mr. Frye was the industrial agent for the Southern Pacific Railroad Comp[illegible]. During our negotiations we also contemplated the location, if possible, of the Ford plant. We presented to the Ford authorities very detailed and comprehensive plans of the development of Brewer's Island, east of San Mateo. Later on other industries were contemplating location there, including the Chrysler plant, and we, again, presented to them the Emma Rose location, which to my mind was the best location down there. We always ran into a brick wall; if there are no industries there you have no facilities for switching. That was the proposition. So we insisted upon the Southern Pacific Company constructing some switch tracks in that section. So finally we sold the idea to the Southern Pacific Railroad Company, and they agreed with us that

(Testimony of Daniel C. Imboden.)

you could hardly expect people to go there with light industries or with heavy industries without having some switch track facilities. They agreed to construct a switch track down through the Emma Rose property. In their behalf, or in behalf of the Chamber of Commerce, rather, I presented the plan of the Southern Pacific Railroad to the City Council of San Mateo County some time in 1925, I believe it was either August or September, I don't recall the exact date. They appointed a committee. The City Council appointed a committee to work with the Southern Pacific, and the Emma Rose property, the manager of that property [175] being Mr. E. S. McCurdy, in constructing this switch track down through the Emma Rose property. Mr. McCurdy, the manager of the Emma Rose Estate, felt that his property had been subdivided into lots, and he wanted the city to revert his lot into acreage. As I recall it, there was a tentative agreement that the city would do that, because he would be asked to sell off ten acres, twenty acres, or forty acres in a parcel to various factories. He, in turn, agreed to dedicate a very wide street for this switch track. The Southern Pacific Company, in turn, agreed to extend the switch track and to lay it immediately down through the property at its own expense. Any industry that would locate contiguous to that track, as I understood it at the time—I may be wrong about it, but as I understood it then, and as I remember it, those industries were, in turn, to pay the cost

(Testimony of Daniel C. Imboden.)

of tracks from this main switch to their property. I may be wrong in that, but, as I recall it, that was the general plan. That was either in August or September, 1925.

The committee was Mayor Smith, Councilman Beer, City Manager Weissgerber, the City Attorney, McCurdy, and Mr. Peckham, the Chairman of the City Planning Commission; they were appointed to confer with Mr. Frye and with Mr. E. S. McCurdy, on September 21, 1925. We tried to get the Southern Pacific to agree, at least the Chamber of Commerce did, to go farther than through the Emma Rose property. I believe that Mr. Frye would not acquiesce in our request.

Mr. Frye was the man we were dealing with in the Southern Pacific; he was the industrial agent for the Southern Pacific. It was our intention, in the Chamber of Commerce, to develop that whole section out there intensively from an industrial standpoint. We wanted to go out to deep water. As a matter of fact, I took it up with the Chicago Transportation Company; they owned a railroad at that time at South San Francisco. I believe it was known as the South San Francisco Belt Line. I tried to get them to join in the construction of that bridge between San Mateo and Hayward, and come [176] on down the peninsula with a belt railroad, and develop all of that property out there, as well as a deep-water port. We naturally had talked with the Southern Pacific along similar lines.

We wanted the Southern Pacific to come right

(Testimony of Daniel C. Imboden.)

out to deep water. We always talked that, but Frye never could see it. He felt that what they ought to do finally when we got them to agree to develop this particular Emma Rose property was to develop that first, claiming that would be the better part of business, develop that with small light industries and heavy industries first.

The Southern Pacific never made any commitment to me to extend the track beyond the point specified on the map attached to the first authority for expenditure, Plaintiff's Exhibit No. 5.

On Cross-examination by Mr. MANNON.

At that time my discussions with Mr. Frye were to the effect that so far as he was concerned, the Emma Rose tract was to be developed first by the use of this track. Mr. Frye would never acquiesce in our request to develop farther out. He never would agree to do that. At least, I don't remember that he ever did. I believe that I would have been the first to have jumped at it if we could have gotten him to agree to do it. The development he wanted was limited to the Emma Rose tract.

Personally I was also trying to get trackage out to industries I was seeking to locate on deep water.

The City Manager said something about wanting an under-pass built but I don't recall all the details about it.

The property of the Emma Rose estate that was to be developed at that time was property that was subdivided into lots and blocks and Mr. McCurdy,

the manager of the Emma Rose estate, asked the City Manager to revert that back to acreage. That was the only property that Mr. Frye definitely committed himself to to be served by railroad tracks.

I was not familiar with the San Mateo Docks Company development; [177] I was more familiar with the Mineral Metals & By-Products Company development. That was on the same property that was owned by the old San Mateo Docks Company. It is shown on Plaintiff's Exhibit No. 1. The Mineral Metals & By-Products Company development contemplated the dredging out of a 500-foot channel up to approximately the levee at San Mateo and a turning basin in Section No. 16, and in Section No. 16 to dredge out a sufficient turning basin to accommodate sea-going ships that might want to berth at this point. They were going to establish their plant on this submerged land, and reclaim this land from time to time. They contemplated bringing in refractory ores from South America and smelting them by electrical process at that point. The territory I have been pointing to on Plaintiff's Exhibit No. 1 is marked Sections 10 and 16 and a portion of Section 15. There have been no other projects to my knowledge for the development of those particular sections. The projected developments on the deep water off of Brewer's Island were plans, prepared by Engineer Otto Von Geldern; Mr. Schilling spent considerable money in having all of these plans prepared. As I recall it, we were going to run slips

(Testimony of Daniel C. Imboden.)

out to the deep-water channel in the bay, about where the bridge goes over it at the present time. We were going to try to secure the Ford plant to go in there. We tried to secure also the Illinois Pacific Glass Company. They would not agree to go out that far, however; they couldn't see that.

The Ford plant people came out; they were very secretive in all the statements they made, they kept everything to themselves, and made no immediate decision. Later on, as I understood it, they went to Richmond.

I think that practically all of the Emma Rose property is reclaimed. I am not so sure that all of it was originally marsh land. I don't believe that some of it was. Beyond the subdivision it is all filled.

I went to work for the Three Cities Chamber of Commerce in [178] about April, 1921, and remained with them until November, 1925. The Illinois Pacific Glass Company's negotiation started in 1922, if I recall correctly. They continued for at least two to three years. They cared nothing for the deep-water frontage. I was seeking to have that used for terminal projects. In my judgment that is what it is really useful for.

It was a part of my regular duties to seek to locate industries out on deep water and east, say, of the Rose properties. We had three main programs; one of them contemplated locating people on the peninsula in homes; that, of course, involved transportation. Another one was the development

(Testimony of Daniel C. Imboden.)

in industrial projects on our vacant industrial land, industrial land that really was not fitted for homes. And then we wanted to build that bridge between San Mateo and Hayward. We also wanted to develop the deep-water terminal.

On Redirect Examination by Mr. DURBROW.

Mr. Frye, for the Southern Pacific Company, as I understood it, agreed that the Southern Pacific Railroad Company would construct a switch track through the Emma Rose property at the expense of the Southern Pacific Railroad to go down Eleventh Avenue, to the end of the Emma Rose line.

On Recross-examination by Mr. MANNON.

I don't recall attending a meeting held on October 7, 1925, of the City Council Committee, the City Planning Commission, the Southern Pacific officials, the city manager, the Emma Rose estate manager, and the Chamber of Commerce. As I understood it, the track was to go from one length, from the west end of the Emma Rose property to the east end of it. I may have misunderstood Mr. Frye. I don't know anything about the authority for expenditure which refers to 36 acres. I don't recall how many acres are in the Emma Rose property. My general idea of it is that there are a number of hundred acres in the entire property. I could not locate those particular 36 acres unless they have reference to the 36 acres which [179] would adjoin on to this switch track which they

constructed. I would expect the 36 acres to be a portion of the lands as I understood it which were subdivided. My understanding was that Mr. Frye did make a commitment at that time that he would build a track clear across the Rose property. We did not have it in writing. How far it goes I could not at this moment tell you.

The San Fancisco Bay Toll Bridge was completed in the early part of this year. It was commenced in 1928, or in the fall of 1927. The highway which leads to it through the city of San Mateo was projected at that time. It played no part in my discussions with Mr. Frye.

TESTIMONY OF ALBERT K. FRYE, FOR PLAINTIFF.

ALBERT K. FRYE, a witness called for the plaintiff, being first duly sworn by the master, testified as follows:

On Direct Examination by Mr. MANNON.

Right now I am representative of the freight traffic department. Up to the first of the month I was industrial agent for the Southern Pacific Company and had been since March, 1920. I have been employed by that company 39 years.

I heard a part of Mr. Imboden's testimony. I did have discussions with him and with other representatives of the public concerning the development of the properties lying between the main line

of the Southern Pacific from San Francisco to Los Angeles and the Bay Shore or Harbor line.

Commencing in 1921, the folks down at San Mateo and my own people were desirous of developing San Mateo. They wanted industries down there. I took several prospects down and showed them that property. The only property that seemed desirable at that time was the Emma Rose property because it was higher and harder than the other property. After a year or two I came to the conclusion, and I believe mentioned it to the city officials in San Mateo, that about the only way we could get industries started in San Mateo was to put a switch track down there and have something to show these prospects when I [180] took them down. I was authorized to go ahead and tell these people that we would lay a track at the Emma Rose property so that we could develop the property industrially. Mr. Dawson, assistant division engineer, Mr. McCurdy and myself looked over the Emma Rose property first part of September, 1925. I talked the matter over with the Mayor, Mr. McCurdy, Mr. Imboden and Mr. McGrath, and they called a meeting of the City Council. I concluded that everybody was in accord and that they would close the streets and lend us every assistance. I got our people to say they would spend the money and put this spur-track down on the Emma Rose property. The principal stumbling block there was from our main line across our right of way and thence to Railroad Avenue. It took quite a little

bit of money to put that track over to this property.

Mr. Weissgerber had got an idea that he could wiggle something out of us in the way of a subway on Ninth Avenue. I told him this would delay industrial development and requested him not to inject the question of a subway into industrial work. We have never been able to get together yet on account of the city manager's attitude, which you might call "trading."

We started the work of getting data and getting people to acquiesce to the development of the property in 1921. Between 1921 and 1925 I took several prospects, including the Illinois Pacific Glass people, Kenyon Rubber Co. and others, and endeavored to induce them to locate on the Emma Rose property. The Emma Rose property looked more favorable so far as railroad development was concerned. I thought we could put industries on the high, hard land there better than we could on land that was lower and probably marshy. I don't think I had anything to do with the improvement of the San Mateo Docks property. I haven't any recollection about the terminal that Mr. Imboden stated he was interested in the development of on that property. So far as I know, in 1925 the Southern Pacific had no intention at all of ever building out to deep water. As a representative [181] of my company, I never contemplated the extension of any tracks down to deep water on the easterly side of the Emma Rose property. At that time I was

(Testimony of Albert K. Frye.)

devoting my time to something that we could make use of.

I, as one of the company, walked over and drove over it with Mr. McCurdy and Mr. Dawson and it did not impress me enough to interest me at all at that time. I didn't give it any consideration because it was so remote that it was not of sufficient value to take up my time.

I don't know just how far the Emma Rose property goes with respect to the low land, but I told Mr. McCurdy that we would build tracks on his property to develop it. I don't recall how far we were to build the tracks. Remember, I don't go into details like that as well as some other officials of our company.

I recall nothing of consequence about the San Mateo Docks property. I don't think I ever saw it delineated on a plat of the company. I did not know anything about Mr. Schilling's development of Brewer Island and I never talked to him about this proposition. I know that he owns lots of land but it is my understanding that he did not want to dispose of it. Mr. Cline came to see me about developing some property he owned on Brewer's Island or about any suggestions that I might have as to the best way to dispose of his land. One of my suggestions was that it might be a good place to raise hogs on or gardens. I think I asked our people to see what the approximate cost would be to run a railroad down there and run a spur or something. If I remember correctly it was out of all reason to serve that property for say 50 or

(Testimony of Albert K. Frye.)

100 years. I may have given Mr. Cline a print and it may have shown railroad switches extending to his property. I generally get them to put three or four or five or six or seven possibilities. I do not recall giving him a plat but believe he asked for a plat and I asked someone to give him one. I asked someone to put out some tracts for him prospectively to [182] illustrate where the tracks would go. I told the engineers not to go to any great expense in going down there or anything like that, but "just help from your prints and knowledge." In effect, I told them to give the old man the best help they could, so that he could tell whether his property was worth big money or small money. I don't remember having seen that map. What I was seeking to do in San Mateo was to develop that high land which in this case is owned, as I understand it, by the Emma Rose estate. Had there been any other development there requiring railroad service, I would have been equally interested in developing those projects, if they looked feasible and advisable. I initiated the project for serving the Rose property.

Referring to the following language in the authority for expenditure: "Property served: Tracks now proposed will serve about 36 acres of industrial property and tracks proposed under future plans will serve an unlimited territory extending clear to the bay." The spiel in that argument is made by the office engineer. He makes it just as strong as he can to try and get the appropriation. When you go to get an appropriation for building tracks you

(Testimony of Albert K. Frye.)

have to go some. I was not a bit interested in the flat land a couple of miles away from the town because you cannot get folks to go to work out there. I had no idea at all of going across the Rose property during my lifetime.

TESTIMONY OF DANIEL J. McGANNEY, FOR PLAINTIFF.

DANIEL J. McGANNEY, a witness called for the plaintiff, upon being duly sworn by the master, testified as follows:

On Direct Examination by Mr. MANNON.

I am assistant to the freight traffic manager of the Southern Pacific Company, and have been since April 1, 1928. I have had 18 years service with the Southern Pacific.

"Mr. MANNON.—Q. I wanted to ask you about some of the testimony that you gave at the hearing before the Interstate Commerce Commission in the matter of the application of the Western Pacific California Railroad Company for a certificate of public convenience on the [183] Redwood City. Line. The testimony was given on January 22 and 23 of this year. You remember being a witness at the hearing, do you?

Mr. McGANNEY.—A. I do.

Mr. MANNON.—Q. I wanted to call attention to so much of your testimony as appears on page 736 of the transcript, and I will read it to you if I may:

(Testimony of Daniel J. McGanney.)

'Exhibit No. 84 shows tinted in pink at San Mateo Point a portion of the only immediately available industrial land on the peninsula from San Francisco to Redwood City that would be served by the proposed new line. This represents the strip of land on San Mateo Point extending south from what was formerly Pacific City, an amusement resort, to the southern San Mateo County Line.

Q. You mean south of South San Francisco, do you not, this is the only land south of South San Francisco immediately available?

A. It is the only land immediately available south of San Francisco.'

You recollect giving that testimony at the time, do you?

Mr. McGANNEY.—A. Yes.

I referred to the industrial land that would be immediately available and could be served by the proposed new line of the Western Pacific of California.

Mr. MANNON.—Q. We have here a certified copy of that Exhibit 84. It is part of Plaintiff's Exhibit 2 in this hearing. Will you illustrate what land it was that you were speaking of from this Exhibit 84?

Mr. McGANNEY.—A. The land that is tinted in pink at the right-hand side of the exhibit, just south of Big Coyote Knoll, and east of a green line drawn on the map, which was to illustrate the probable

location of the Western Pacific Railroad of California. The acreage is 161 acres."

I am familiar in a general way with regard to the construction of the Emma Rose spur, being chief clerk to the freight traffic manager, Mr. G. W. Luce, at the time the plan was worked out. I discussed it many times with Mr. Frye when he was endeavoring to bring about this development. I know he was authorized to get up and work out a plan for the industrial development of the Emma Rose property. Such matters were a part of my particular duty. The freight traffic department assists the industrial department in preparing the way for the location of industries. I never heard [184] anything about any proposed development on Brewer Island by the Schilling interests until this morning. I did know of Mr. Imboden's idea of the development of a dock company through a discussion I had with him prior to 1925 involving the question of rates. I think his idea principally in developing some kind of harbor was to gain the benefit of San Francisco freight rates in all directions. I explained to him that it would be impossible because the Commission did not permit the meeting of water competition where water competition did not actually exist. Nothing ever came of it. He did not tell me that he and associates had acquired the land. I never heard of the industries that were proposed to go on the water frontage. I never showed the Ford people Brewer's Island nor did I hear that the Ford people had been showed property on Brewers Island as a pros-

(Testimony of Daniel J. McGanney.)

pective site for their plant. I remember giving the following testimony at the Interstate Commerce Commission hearing when the matter of the application of the Western Pacific California Railroad Company was under consideration here in San Francisco. "Now with reference to these industrial leads which the Southern Pacific puts into promising industrial areas, it is your practice to demand a right of way for your track which in terms grants you the sole right to use that right of way? A. Yes; when there is a piece of industrial property to be developed, we, in co-operation with the owner, agree to put in the necessary drill tracks from which individual spurs may be taken and the owner deeds us a right of way for the location of that track; it is usually a right of way about 17 feet in width, and, of course, on our own track, and on a right of way that has been deeded to us, we would be the only company that would operate on it."

On Cross-examination by Mr. DURBROW.

The proposed track will be a part of San Mateo station and the rates published in our freight tariff to and from San Mateo will apply to industries located on or served by the Emma Rose spur. There would not be an additional switching charge. It is our policy wherever [185] possible, and where the prospects appear bright, to develop property adjacent to our tracks for industry purposes. In carrying out that policy we have found it necessary, in co-operation with property owners, to construct industrial switching tracks into acreage prop-

(Testimony of Daniel J. McGanney.)

erty from which individual industrial tracks may be taken to serve industries—the individual industry. We have pursued that policy to my knowledge since 1920, and before that, also, up and down our line, form Portland to El Paso, and Ogden. We found it necessary in the first instance to pursue this policy, for the reason that unless some plan could be worked out with property owners owning considerable property for the industrial development of that property, we felt that we would soon find ourselves without suitable property on which to locate industries adjacent to our rails.

Right in San Francisco we have in recent years developed a very fine industrial district between Tunnels 3 and 4, known as the Paul Tract, to the west of the main line, and known as the Bay View tract to the east of the main line. That area of land was in vegetable gardens for many years past, and cheap residential zones were gradually encroaching upon it. We finally interested the property owners to develop it industrially. We went ahead and built the industrial switching tracks, and there have been a number of fine industries located in that district since about 1923. Proceeding further south, we had a similar development at Bay Shore. And again, farther south, at South San Francisco. A few years ago we built an industrial switching track, or sometimes it is referred to as a drill track, the terms are synonymous, into about 100 acres of land prepared for industrial development by the South San Francisco Land & Improvement Company. No industries have as yet been

(Testimony of Daniel J. McGanney.)

located on that parcel of land, but we are confident that they will come within a reasonable time. There are several hundred other acres adjacent which will be served in a similar manner when the first hundred acres are used up. [186] Farther south, again, at Broadway, in Burlingame, we built an industrial switching track or drill track, into twenty acres of land opposite our Broadway passenger station, on which we have succeeded in locating two industries. The San Mateo Rose Estate property was next in order, and we have, of course, discussed that development. Passing that, we put in several industrial switching tracks into a tract of about 40 acres at San Carlos, on which several industries have been located. And so on down the line—Santa Clara, San Jose, Salinas, on the Coast Line. We have followed exactly the same practice in the East Bay District—Richmond, Oakland, Emeryville, Melrose, San Leandro. And I might mention in passing that both the Atchison, Topeka & Santa Fe Railway and the Western Pacific have done likewise, both for their own account and jointly with the Southern Pacific. We have joint industrial switching tracks at Oakland, Sixteenth Street, with the Santa Fe, and joint industrial switching tracks with the Western Pacific at Melrose and at Fitchburg, designed to and which are accomplishing the identical purposes for which the Emma Rose industrial switching spur was planned. All of these facilities have been constructed since 1920.

None of the carriers interested in any of those facilities applied to the Interstate Commerce Com-

mission for a certificate of public convenience and necessity under the provision of paragraph 18 of the Interstate Commerce Act. I might mention, just to complete the picture, that we have followed the same practice exactly in Sacramento, Stockton, and Fresno. The Western Pacific has also done the same at Stockton; and the Santa Fe and ourselves at other points in the San Joaquin Valley. The Western Pacific built a long track which they considered a spur-track from off of their main line just north of the city limits of Stockton, swinging around the city of Stockton to the north and to the west, and thence turning east, and serving the north side of the Stockton channel. The Southern Pacific constructed a similar track along the south side of the Stockton channel, although it was not as long as the one constructed by the [187] Western Pacific, but it served the same purpose. This Western Pacific track was approximately 6 miles long.

I am familiar with the Rose property and have considered it from an industrial standpoint. It is probably the best piece of industrial property of a large area south of South San Francisco on the peninsula. Part of it has been zoned for light industry, and part of it for heavy industry. That portion of the Rose Estate between Eleventh Avenue and the southerly city limits of San Mateo, and the Southern Pacific right of way, and the Bay View Boulevard has been zoned for light industry. The Rose estate, or about all of the Rose estate that

lies east of the Bay View Boulevard, is zoned for heavy industry, except the northerly most portion parallel to the toll bridge highway, which is zoned to second-class residential.

Defendant's Exhibit "F" (original exhibit transmitted to Circuit Court of Appeals under order of District Court) contains map showing the zoning in the city of San Mateo in this vicinity under ordinances of the city of San Mateo adopted by the City Council, certified copy of which ordinances were received in evidence as Defendant's Exhibit "E." The maps are in a series of three. Sheet 1 shows the zoning of the city of San Mateo as of March 20, 1922. Tinted in pink is shown property zoned for heavy industry. That is a part of the Rose estate, east of the Bay View Boulevard. Tinted in yellow shows the property zoned for light industry; that is a part of the Rose estate south of Eleventh Avenue, and between the Bay View Boulevard and the Southern Pacific main line right of way. That tinted in green is residential district No. 2, or second-class residential.

Sheet No. 2 is made in exactly the same manner and shows the zoning as of September, 1925. On both of these sheets is outlined by a narrow yellow line the limits of the Rose estate that is in the industrial zone. Sheet No. 3 shows the zoning of San Mateo as of February 20, 1928, and as it remains to-day, there having been no zoning ordinances passed since ordinance No. 209 of Febru-

(Testimony of Daniel J. McGanney.)

ary 20, 1928. The [188] color plan outlining the zone districts is the same as for sheets 1 and 2.

The northerly-most portion of the Rose property, as indicated on Sheet No. 3, has been zoned for second class residential. The property northeasterly thereof, and extending to Peninsula Avenue—the northerly limit of the City of San Mateo, has also been zoned for residential. So that the only industrial property in San Mateo is the light industrial property of the Rose estate west of the Bay View Boulevard, and the heavy industrial property of the Rose estate east of the Bay View Boulevard, and south of Third Avenue, and the San Francisco Bay Toll Bridge highway.

The light industrial property on the Emma Rose estate is contiguous to the Southern Pacific's main line right of way and the track extending from the Southern Pacific's main line right of way through the Rose property lies all within the City of San Mateo and all within the Rose property which has been zoned industrially. If this track is constructed it is reasonable to assume that industries will locate upon the property which has been zoned as industrial. We expect that to be brought about, and it will be the endeavor of the freight traffic department, and the industrial department to bring about such industrial development. It is, of course, not possible for me to say what industries will or will not be located there. That is a matter for the future. The development will have to be brought about by future efforts. It is ideal industrial

(Testimony of Daniel J. McGanney.)

property, however, well situated in relation to the town, had good highway approach. San Mateo furnishes a fairly good labor market. We are very hopeful that industries will be readily located on the property.

Shipments moving to and from industries located on that property will be billed by the agent at San Mateo as originating at San Mateo. They will take the San Mateo carload freight rates, and be handled in every manner similar to an industrial located right alongside the freight station. If an industrial should locate on either [189] the light or heavy industrial property and have an L. C. L. shipment to deliver to, or receive from, the railroad, such shipment would be handled either by motor-truck or by dray to and from the San Mateo freight station. That is the usual and the invariable custom and the practice at all such similar points.

I have here Southern Pacific Form No. 3402 entitled "Track Estimate and Agreement" printed July 28, 1925. This was the form of industrial track agreement in use prior to December, 1925. In December, 1925, the form was amended and the form adopted as shown by Exhibit No. 12. Exhibit 12 shows the present form of industrial track agreement exactly as it was adopted in 1925, with the exception of one word, the changing of which has no material bearing on the sense of the agreement.

(Testimony of Daniel J. McGanney.)

On Redirect Examination by Mr. MANNON.

The three maps comprising Defendant's Exhibit "F" were prepared after I had looked over the ordinances and at my request by our engineering department. I know that they are in accordance with the ordinances so far as my reading the ordinances and looking at the maps is concerned. I have looked them over myself. Mr. Astrue, our chief draftsman, is the only other person who went over the maps with me. The maps came from the engineering department on September 3d. These maps were made on the day of the hearing. We first examined these maps in Mr. Durbrow's office the morning of the trial, that is, either this map or one just like it. The red line on the third sheet of the map which starts from our main line near Leslie and runs out to the waters of the bay represents the proposed location of the Emma Rose industrial switching spur. The track on that map was made in conformity to the authority for expenditure and crosses the San Francisco Bay Toll Bridge Company's road, although, as has been fully explained by other witnesses for our company, it is not the intention to construct the track beyond the San Francisco Bay Toll Bridge road.

I read the deed from the Emma Rose estate to the Southern Pacific [190] Company before it was executed. It only requires us to go as far as the toll bridge road. That was our intention. We have the right to build beyond that road, subject to the approval of governmental bodies. The plan

(Testimony of Daniel J. McGanney.)

as I have always understood it and heard it discussed was that we would serve the property of the Emma Rose estate and develop it industrially. The matter of not crossing the San Francisco Toll Bridge road was discussed by our officials.

A decision of this sort involves the consideration of the freight traffic department and I happen to be the one in the freight traffic department who is called upon to discuss the matter and determine what we should do. I never made any report, written or verbal, to the effect that the spur or the extension or whatever terminology is used should be constructed differently from the authority for expenditure. I simply stated to Mr. Mathews who talked to me about it that the change would be satisfactory to the freight traffic department. Mr. Mathews was the engineer whom Mr. Kirkbride designated to build the track.

The policy of our company is not confined to the property which is in one ownership, that is to say, if the Rose tract were in two or three ownerships our policy with regard to its development would be the same provided it appeared to us to be reasonable and the possible thing to do. The policy of the company would not be affected if that exact tract were in two ownerships or split up into four ownerships, provided all the owners were ready and willing to devote their property to industrial purposes and would dedicate the necessary property.

With respect to sheet 1 of Defendant's Exhibit "F" my recollection is that so far as the zoning is

(Testimony of Daniel J. McGanney.)

concerned, it only covered the land which is tinted on this map. I presume if the city limits do extend out to the bay that this other land was not zoned because it is not fit for anything, it is under water.

We have no expectation of developing any property adjacent to [191]. the Rose property. There are about 7500 acres of property between San Francisco and Redwood City that are immediately available for industrial development along our main line. Adding the Rose property of about 500 acres, makes about 8,000 acres of industrial property immediately available. It is our view that this acreage will be sufficient to take care of any industrial development that might take place on the peninsula for many, many years to come. My recollection is that in my testimony before the Interstate Commerce Commission in the Western Pacific Application, I. C. C. 7025, I think it is, I estimated that that property would take care of the industrial requirements of the peninsula for about 25 years. Consequently we have not planned nor do we expect to serve or be called upon to serve property beyond the Emma Rose property by the Emma Rose industrial switching track.

If deep water terminals were established on the channel, whether we would make rail connections therewith would be determined on the conditions present if and when such a plan were proposed. Whatever seemed to be the desirable, economic and proper thing to do would receive consideration at

(Testimony of Daniel J. McGanney.)

that time. If the construction of a deep water terminal should take place, my company would expect to serve such terminal or industrial development in whatever manner happened to be the most economical and efficient way of doing it, and if the closest piece of track to serve such development was the Emma Rose track, then that track might be used. That would have to be determined by the engineering situation. Whatever appeared to be the most desirable, economic and proper thing to do would probably be done. I am unable to imagine at this time or to contemplate anything of the sort.

From my own knowledge it would be difficult for me to say whether it could be done in this way. It is difficult to form an opinion on something that isn't. I don't know whether we would be able to get across that toll bridge road or whether some other scheme would [192] be worked out that would be less objectionable than that, or what the situation might be. Railroad operatives would have no objection to cross the toll bridge road with a spur-track. The crossing of the highway with a spur-track would afford no operating difficulties of consequence.

"Mr. MANNON.—So that there really would be no reason, if you wanted to cross that, or if your company wanted to cross the toll bridge highway with a spur-track, there would be no reason, I say, why you should not cross it, as far as you know?

Mr. McGANNEY.—No.

Mr. MANNON.—And that would be true if there

(Testimony of Daniel J. McGanney.)

were a number of highways that had to be crossed by the spur-track at grade, would it not, from your point of view?

Mr. McGANNEY.—Well, of course, that is getting into something where we are again asked to imagine something that I have not any picture of.

Mr. MANNON.—You can get a picture in your mind, can't you, of a spur-track crossing two highways, or three or four?

Mr. McGANNEY.—I know of none.

Mr. MANNON.—When this spur is built which is authorized on your Sheet 3, how many highways will it cross, as far as you know?

Mr. McGANNEY.—It will not cross any highway now in existence.

Mr. MANNON.—Do you think the Bay Shore Highway will not be there?

Mr. McGANNEY.—It is not now in existence.

Mr. MANNION.—I know that, but you contemplate that it will be built, don't you?

Mr. McGANNEY.—Well, I suppose it will be, yes.

Mr. MANNON.—Then this red line which is drawn here will cross the Bay Shore Highway, and the San Francisco Toll Bridge Company's highway, will it not?

Mr. McGANNEY.—No, it will only cross the Bay Shore Highway.

Mr. MANNON.—I don't want to quibble with you about words, Mr. McGanney.

(Testimony of Daniel J. McGanney.)

The MASTER.—The red line is drawn on your map showing it, isn't it?

Mr. McGANNEY.—Yes, the red line is there.

Mr. MANNON.—And the authority for expenditure by your company is in accordance therewith, isn't it? [193]

Mr. McGANNEY.—That is correct, but, as has already been explained, innumerable times, the red line does not represent the track that is to be built in so far as it involves the crossing of the San Francisco Bay Toll Bridge Company's road.

Mr. MANNON.—But you testified as to the correctness of the map as of September 3d, the day this hearing commenced.

Mr. McGANNEY.—As the plans were drawn.

Mr. MANNON.—We started out with the proposition that you could not imagine that a spur at grade would cross two highways. If this were built in this way it would so cross two highways, would it not?

Mr. McGANNEY.—If it were built that way it would."

TESTIMONY OF J. B. DAWSON, FOR DEFENDANT.

J. B. DAWSON, a witness called for the defendant, being first duly sworn by the master, testified as follows:

On Direct Examination by Mr. DURBROW.

I reside at El Paso, Texas, and am division engi-

(Testimony of J. B. Dawson.)

neer, Southern Pacific Company, at present assigned to the New Mexico Division. Between November 1, 1923, and July 1, 1928, I was assistant division engineer on the coast division. During that time I had something to do with the preparation of plans and the authorities contemplating the construction of tracks on the property known as the Emma Rose Estate at San Mateo.

I had negotiation many times with the representative of the owner of the property and with city officials with respect to that development. To the best of my recollection, the matter first came up in September, 1925. On or about September 18, 1925, I was called to accompany Mr. A. K. Frye, industrial agent of the Southern Pacific Company, and Mr. E. S. McCurdy, to San Mateo, to look over the property preliminarily to ascertaining how could it be converted to industrial property. We went down in a machine and went over the property, some parts of it by automobile, and some parts on foot, and we spent some time there. I was told by Mr. McCurdy that he was very anxious to get industries located on the property, that he anticipated closing certain paper streets south of Eleventh Avenue, to make the then subdivided property available for industries. I [194] learned through Mr. Frye that certain industries could probably be located there, although I did not hear the names of the industries. A few days later, as near as I can fix the time about September 21, I attended a meeting in the City Hall at San Mateo. That was Sep-

(Testimony of J. B. Dawson.)

tember 21, 1925. As I recall it now, it was a meeting of the City Council. Mr. Imboden, representing the Three Cities Chamber of Commerce, was there. There was a general discussion about the desirability of asking industries to San Mateo, and particularly taking steps to locate industries on the Rose property. It was a rather enthusiastic meeting, as I recall it. There was a second meeting on or about October 7, 1925. I was present at the meeting. There was a sort of a committee appointed, consisting of Mr. Imboden, Mr. Weissgerber, the city manager, Mr. Frye, and myself, to endeavor to work out details for making available the Rose property for industrial purposes. A few days after this meeting, in October, 1925, Mr. McCurdy furnished me with prints showing the extent of the Rose property. After looking it over with him and discussing the matter, plans were made up to take a track across the property about midway between Tenth Avenue and Eleventh Avenue, and to reach the approximate center of the Rose property. It took some time to work up these plans, as I recall it. To the best of my recollection, it was in November, 1925, that Mr. McCurdy and I called upon city manager Weissgerber, and laid the plans for the spur-track before him. The understanding with him following that meeting was that he would assist the property owners in securing the closing of certain streets, or, if necessary, the issuance of spur-track permits to permit the construction of an industrial drill track. I kept in touch with Mr. Mc-

(Testimony of J. B. Dawson.)

Curdy, and through him learned that the city was making a request for grade separation at Ninth Avenue, San Mateo, in lieu of closing the paper streets.

This grade separation was for the main track. Mr. McCurdy advised me that he was able to meet the other demands of the city but that he was not in a position to negotiate with them concerning [195] the Ninth Avenue grade separation. I told him that in handling the matter with Mr. Weissgerber, the Ninth Avenue grade separation was something entirely apart from the industrial development, and would have to be handled on its merits. This grade separation related to the construction of this facility at San Mateo in this way. Our plans at that time contemplated the extension of two drill tracks or switching tracks southerly across Ninth Avenue.

On February 2, 1926, Mr. Worthington, then superintendent of the coast division, called on city manager Weissgerber at his office in San Mateo and explained to him that we could not hope to work out the subway in connection with industrial trackage. We explained to him that our manner of handling subway matters was on their merits, and on the basis of a showing of public necessity and convenience, which we did not feel existed in connection with Ninth Avenue at that time. He agreed with our views, Mr. Weissgerber did, and said that he would undertake to work it out on that basis. He did not do so.

(Testimony of J. B. Dawson.)

Mr. McCurdy reported to me that he was unable, through Mr. Weissgerber, to secure the closing of streets, unless a definite promise could be made to construct the Ninth Avenue subway, which could not be given.

The map accompanying the first authority was prepared under my immediate direction. The length of track which the Southern Pacific Company proposed to construct at that time is in accordance with the red line on the map (Plaintiff's Exhibit No. 5) reaching from the main line of the Southern Pacific eastward to the approximate center of the Rose property. The green line shown on the map enclosed within the red dotted lines represents possibilities. It represents how a track could have been constructed, depending on the needs of industry and the class of industry that might seek location there.

The map filed with the second authority for expenditure was prepared under my direction. That map (Plaintiff's Exhibit No. 5) shows definitely the length of the proposed construction by the solid [196] red line within the dotted red line. I made the second map relating to the construction of this facility because Mr. McCurdy was unable, even through court proceedings, to secure the closing of the paper streets and convert this property to a condition suitable for industry. He came to me saying that he was unsuccessful, and that it would be necessary to revise our track layout to reach the property without touching upon the paper streets.

(Testimony of J. B. Dawson.)

It was revised to overcome that difficulty, and to reach substantially the same property, and for the same purpose.

I had nothing to do with the preparation of the map that was attached to the third authority for expenditure. I had left the division by that time. The San Francisco Bay Toll Bridge was not constructed or in the course of construction at the time I prepared the two maps in question.

On Cross-examination by Mr. MANNON.

The legend on the map attached to the first authority for expenditure which was prepared under my direction tells the story as I knew it at that time. We expected the green line to show the ultimate industrial development, as near as we could determine, considering the uncertainties of class, kind, and number, and other characteristics of industries that might seek to locate on this property. In laying out industrial lay-outs, and in making track layouts, and in the preliminary plans for the accommodation of tracks to industries, it is necessary to work with the reservation in mind that changes may be made necessary by the nature of the size, condition, and other features of the industries. This plan is shown with the green line and the legend, "Ultimate industrial development," that represents a possible industrial development. It represents a possible ultimate development, dependent on the nature, kind, and class of industry seeking location there. When I said "ultimate in-

(Testimony of J. B. Dawson.)

dustrial development" on the map that is what I meant with certain reservations. [197]

The green line extends beyond the limits of the Rose property. It is shown outside the limits of that property by broken lines. It extends into the water for a considerable distance. I should be permitted to qualify that statement with the explanation that this shows an ultimate possible development. For reasons previously explained, we are unable to say what changes might be necessary to meet the varying conditions of industries. This is, in a way, a dream. It was shown to meet the request of the representative of the Chamber of Commerce, to show possibilities of industrial development beyond the limits of the Rose property. Out of deference to their wishes I turned in this map. I also turned it in to my superiors for them to act on. It was possible to have constructed the track ultimately as shown in green. It represents my best judgment, yes, in this way, should the requirements of industry necessitate it it would have been possible to construct the track as shown on the green line between the red lines on the map in the exhibit. I reported to my superiors that the green line represented the ultimate industrial development with this qualification, that that is a possible solution to meet the requirements of industry, should they require track along that location.

The industrial development that I reported to my superiors seemed at that time the most plausible

(Testimony of J. B. Dawson.)

way to serve industries in that territory should they require service.

In September, 1925, I had no definite knowledge that the Bay Shore Highway would be constructed. I had very little general knowledge of its construction. I knew generally that the Bay Shore Highway was proposed down the peninsula but I did not know the definite location. Very generally I knew that the location was proposed down the peninsula. With respect to whether it would be between our main tracks and the bay I was not certain that it would be between those places. I assumed that the highway would probably be somewhere between the tracks and the bay, but I had no definite judgment just [198] where it would be. My judgment was that in view of the configuration of the country that it would be between our main tracks and the shore of the bay, but I had no definite knowledge of it at that time. This would mean that the highway would have to cross the Rose tract. In a discussion between myself and Mr. McCurdy, we mentioned the fact that the Bay Shore Highway might desire to cross their property. There was nothing said in my conversation with Mr. McCurdy as to whether the track we were projecting would be built across the highway because the highway did not then exist. I did not know at that time that our line would cross the line of the Bay Shore Highway for this reason, that we hoped to be able to close the streets and construct the industrial drill track within a very short time. We started on this matter in 1925. He represented that he had cer-

(Testimony of J. B. Dawson.)

tain industries that were anxious to locate quickly and that he could not interest them in the property until he had a track on the property or very closely adjacent to it, on which he could offer them sites. For that reason he was very anxious and we were anxious with him to meet the industrial situation and provide for the construction of tracks as early as possible. It was my understanding that there was no surveyed line at that time on the ground. The distance between the Rose property and into the bay where the green line marked "Ultimate Industrial Development" extends is approximately 11,200 feet. Referring to your statement that the record through the testimony of Mr. Skaggs shows that the survey was run through the City of San Mateo and southerly of Fifth Avenue therein in December, 1923, and your question as to whether there were survey stakes through there, in my examination of the property two years later I did not see any survey stakes of the Bay Shore Highway and as I recall Mr. Skaggs' testimony in this room he did not make any reference to stakes having been set at that time. I have no definite knowledge of the location which you say Mr. Skaggs says was made in December of 1923. The indefinite knowledge that I had consisted of rumor and vague press [199] reports of the ultimate projection of the Bay Shore Highway southerly through San Mateo. I learned nothing definite from the press reports with respect to the location of the highway except that it would cross the Rose property. I did not know that the highway would cross the Rose prop-

(Testimony of J. B. Dawson.)

erty but I judged so if the reports were accurate. I saw no press reports informing me that the Bay Shore highway would cross the Rose property. They stated that it would extend southerly through San Mateo and through San Mateo would be across the Rose property.

Mr. MANNON.—And you expected that the Bay Shore highway would be along the Bay Shore, did you not, to some extent?

Mr. DAWSON.—Yes, I expected it would be between the Southern Pacific main line and the then existing edge of the bay.

Mr. MANNON.—And it was your business, as an engineer, to know, as well as you could, where the highway was to be located, was it not?

Mr. DAWSON.—Yes, and for that reason I made careful examination on the ground to see if I could find any evidence of stakes, and I found none.

Mr. MANNON.—But you made no examination with regard to the records of the Highway Commission, did you?

Mr. DAWSON.—No, I did not.

TESTIMONY OF CHARLES J. ASTRUE, FOR DEFENDANT.

CHARLES J. ASTRUE, a witness called for the defendant, upon being duly sworn by the master, testified as follows:

On Direct Examination by Mr. DURBROW.

I am chief draftsman in the maintenance of way department of the Southern Pacific Company and have been for the last 5 years. I am charged with

(Testimony of Charles J. Astrue.)

the responsibility of preparation of the various maps incident to the maintenance of way department, such as track plans, yard extensions, estimating quantities for grading, and other miscellaneous work.

I know of quite a number of instances on the Southern Pacific Company's lines where facilities similar to the one in question have [200] been constructed and also of facilities which have been constructed upon other lines. I have in mind in particular a track which was constructed by the Western Pacific Company at Stockton as has been previously testified.

In 1921 the Western Pacific secured a franchise from the city of Stockton to cover the construction of this track within the limits of Stockton; and in 1922, I think it was in May, the Western Pacific secured a franchise from the Board of Supervisors to cover the construction of this track outside the limits of Stockton, or, in other words, the limits within the county. That track takes off from the Western Pacific main track at the point marked D in Defendant's Exhibit "G," near Calaveras Road. It extends in a westerly direction approximately two miles; thence southerly somewhat less than two miles; thence easterly approximately two miles, a total length of approximately six miles.

On this track the Western Pacific has a team track, a warehouse 50x225 feet in length, a loading platform 15x130 feet in length on which they have a crane for the handling of shipments and in addition thereto, team tracks.

(Testimony of Charles J. Astrue.)

Defendant's Exhibit "J" consists of a telegram from G. V. Shoup to J. R. Bell, Washington, inquiring whether the Western Pacific had obtained a certificate covering the Stockton work and Mr. Bell's reply that he had been unable to find any such record.

The evidence relating to the Stockton work by the Western Pacific was received subject to the plaintiff's objection that it was immaterial, irrelevant, and incompetent, and entirely matters done between other people, and at most can tend to show a violation of law by the Western Pacific Company at Stockton. The same objection was made to this entire line of testimony and to all the other similar evidence.

The purpose of this testimony as stated by counsel for the defendant is to show that it is a custom of railroads in this territory [201] as it is throughout the United States, to construct facilities such as this in the regular course of their business, and that they do so customarily without obtaining any certificate from the Interstate Commerce Commission.

Defendant's Exhibit "L" reflects typical industrial switching tracks that have been constructed by the Southern Pacific Company subsequent to 1920. Such construction was for the purpose of reaching industrial areas adjacent to the main facilities of the railroad. It shows the authority for expenditure number, the location of the facility, the date authorized, character of construction generally, the length of the track, the approximate cost, the

(Testimony of Charles J. Astrue.)

area served, and how the right of way was acquired.

A copy of Exhibit "L" is attached and is to be printed in the record here.

In response to a question by the master asking the object of this exhibit, counsel for the defendant stated: "The object of this is to show that the construction of the Emma Rose spur is in accordance with the practice of the Southern Pacific Company of providing similar facilities at many points along its line to serve industries and to show that this facility is not different from others usually constructed and that there is nothing extraordinary in the construction of a spur-track such as the Emma Rose spur to serve industrial territory."

This exhibit was received in evidence subject to plaintiff's objection.

Mr. Durbrow, counsel for defendant, in response to a question by the master as to the greatest length of track, stated: "The maximum length of track is 13,263 feet. There is another which is comparable with this track, 8217 feet; the last one being located at Emeryville, and the first to which I referred being located at Aurant, Los Angeles."

Some of these industrial spurs shown on Exhibit "L" cross highways [202] in the State of California. We have, right within the city of San Francisco, the so-called Carroll Street spur, which crosses Third Street. This particular street is one of the main arteries leading in and out of San Francisco, and connects with the Bay Shore highway.

EXHIBIT L.

TYPICAL INDUSTRIAL SWITCHING TRACKS CONSTRUCTED BY SOUTHERN PACIFIC COMPANY SUBSEQUENT TO 1920

G. M. O.	Location.	Date Authorized.	Subject.	Length of Tracks.	Approximate Cost to S. P. Co.	Area	Right of Way.
70440	Sacramento	Dec. 6, 1926	Construct 2 spur tracks	(a) 3,260 ft.) (b) 2,470 ft.)	$30,000	70 Acres	Donated.
67529	San Carlos	Apr. 6, 1926	Construct spur track	2,662 ft.	15,000	30 Acres.	Donated by Industry.
77286	Sacramento	Jun. 30, 1928	Construct spur track	5,480 ft.	34,000	134 Acres	30 Acres owned by Cal. Co-op Canneries. 104 Acres acquired by Sou. Pac. Co.
53343	San Francisco	Feb. 26, 1923	Construct spur track (Beale St.)	4,270 ft.	72,000	6,000 ft. of St.	Franchise from City.
60048	San Francisco	Jul. 1, 1924	Const. spur along main and to serve	(a) 3,000 ft.	16,000		
62310	San Francisco	Jul. 31, 1926	property east of main between	(b) 1,441 ft.	10,000	100 Acres	Previously owned by City Franchises and
70963	San Francisco	Jan. 20, 1927	Tunnel 3 and 4	(c) 1,028 ft.	5,000		donated.
			Total	5,469 ft.	$31,000		
62821	San Francisco	Apr. 22, 1924	Construct spur tracks to serve	2,350 ft.	$17,000	35 Acres	Donated.
75046		Sept. 19, 1927	Industrial area between tunnels	1,100 ft.	6,000		
77687		June 12, 1928	3 and 4—west side main track	292 ft.	1,700		
			Total	3,742 ft.	24,700		
61749	Corbin	June 18, 1927	Industrial development	4,918 ft.	$29,000	33 Acres	Donated and by City Franchise.
61560	Oakland	Jan. 8, 1927	Industrial development	3,800 ft.	25,000+	30 City Blocks	Purchased, City franchise & donated.
67291		1927	additional	1,332 ft.	6,000+		
			Santa Fe Connections	750 ft.			
64804	Turlock	Oct. 23, 1926	Construct spur track	3,800 ft.	15,000	100 Acres	Property of S. P. Co.
54834	Aurant	Feb. 16, 1923	Construct spur tracks	2,596 tr. ft. 1,593 tr. ft. 4,061 tr. ft. 1,596 tr. ft. 1,700 tr. ft. 832 tr. ft. 875 tr. ft.		Over 110 Acres.	Donated.
			Total	13,263 tr. ft.	$58,000		
61330	Sacramento	June 29, 1925	Construct spur track	4,827 ft.	25,000	Several Hundred acres.	Donated.
77138	South San Francisco	May 19, 1929	Construct spur track	3,746 ft. (#)	25,000	70 acres	Donated.
70724		1925	Construct spur track	1,400 ft.	7,500	15 acres	Donated.
72741	San Francisco	May 26, 1927	Construct spur tracks in Islais Creek	2,470	34,000	Areas served by both tracks.	To be acquired.
65301	San Francisco	Sept. 15, 1925	District Evans—Newcomb Sts.	3,235	23,000	96 acres.	Franchise.

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				1,593 tr. ft.		Over 110 Acres.	
				4,061 tr. ft.			
				1,596 tr. ft.			
				1,700 tr. ft.			
				832 tr. ft.			
				875 tr. ft.			
			Total	13,263 tr. ft.	$58,000		
61330	Sacramento	June 29, 1925	Construct spur track	4,827 ft.	25,000	Several Hundred acres.	Donated.
77138	South San	May 19, 1929	Construct spur track	3,746 ft. (#)	25,000	70 acres	Donated.
70724	Francisco	1925	Construct spur track	1,400 ft.	7,500	15 acres	Donated.
72741	San Francisco	May 26, 1927	Construct spur tracks in Islais Creek	2,470	34,000	Areas served by both tracks.	To be acquired.
65301	San Francisco	Sept. 15, 1925	District Evans—Newcomb Sts.	3,235	23,000	96 acres.	Franchise.
32878	Emeryville (")		Construct spur tracks to serve	(a) 1,900 ft.			
			industrial area	(b) 3,200 ft.			
				(c) 3,117 ft.			
			Total	8,217 ft.	85,000	Approx. 120	Purchased and part donated.
75450	Broadway-Burlingame	Sept. 8, 1928	Construct spur track	2,659 ft.	14,000	20 acres	18 ft. strip donated. 15 ft. strip reserve on each side.
54427	Shorb	Feb. 20, 1923	Construct spur track	2,790 ft.	13,000	50 acres	Donated.
56906	West Glendale	Sept. 10, 1923	Construct two spur tracks	(a) 1,820 ft.			
				(b) 2,160 ft.	18,000	25 acres	Donated.
			Total	3,980 ft.			
80594	Salinas	Feb. 27, 1927	Siding for industrial development Union Ice Company	2,500 ft.	14,000	12 acres	Donated.
80792	Salinas	Mar. 8, 1929	Spur for industrial development Salinas Valley Ice Co.	1,830 ft.	15,000	65 acres	Donated.
75930	Salinas	April 1928	Spurs for industrial development Monterey County Ice & Development Co.	2,210 ft.	11,000	20 acres	Donated.

(#) 1540 Feet constructed to date.
(") Work began Nov. 20, 1918, completed Sept. 30, 1921.
(+) A T & S F Ry. bore half of cost. [203]

(Testimony of Charles J. Astrue.)

On Cross-examination by Mr. MANNON.

The shortest piece of track my company has been granted permission to construct by application to the Interstate Commerce Commission is a track about four miles long out of Marysville to a point called Dantoni. That was a branch and it has a station at the end together with team track facilities. Replying to your question whether our road has built any other spurs or industry tracks or tracks of any character of as short length as four miles or five miles under authority of the Interstate Commerce Commission, our company has built no spur or industrial tracks under authority from the Interstate Commerce Commission.

Mr. MANNON.—If your Honor please, in view of the fact that it appears that the witness does not know what the decisions of the Interstate Commerce Commission are, or what applications are made to the Interstate Commerce Commission, we move to strike out all of the witness' testimony and all of the exhibits offered in connection therewith which tend to show particular instances with regard to the custom of the railroads of the country in making application to the Interstate Commerce Commission, it being obvious that if he is to testify with regard to custom he must know generally the situation throughout the country.

Mr. DURBROW.—May it please your Honor: This witness was introduced merely for the purpose of showing spur-tracks which had been constructed along the lines of the Southern Pacific and

(Testimony of Charles J. Astrue.)

other carriers serving this territory which were similar to the facility in controversy here. I never intended to contend that this witness was an expert on these matters. He testified that these particular facilities [204] fall within his own jurisdiction. New construction falls under the jurisdiction of the chief engineer. Extension of lines, either from branch or main lines, or the construction of new lines are not within his jurisdiction. He has merely testified to facilities in the nature of the Rose spur which have been constructed along our lines, and along the lines of the Western Pacific and other carriers.

The MASTER.—I think his testimony is admissible. The weight of it is another question. It is competent testimony, I think. How much it is worth is matter of argument.

Mr. MANNON.—We note an exception to the ruling.

With respect to the track near Aurant, indicated on Defendant's Exhibit "M," the longest length of track is 5,500 feet. That is about the longest track on this line which the Southern Pacific Company has built since 1920 without making application to the Interstate Commerce Commission therefor. There is one track which is not on this list (Exhibit "L"), which we have now practically completed without making an application to the Interstate Commerce Commission therefor. It is the track which we are now constructing at the city of Richmond to serve the Richmond waterfront. That

(Testimony of Charles J. Astrue.)

spur or industrial track from where it leaves the main line and out to where it ends is about 9,000 feet in length. The name of that track is the Seaver Avenue spur and it extends to the Parr Terminal.

There was received in evidence at this time as Plaintiff's Exhibit 19 map entitled "Southern Pacific Company, San Mateo-Leslie, Possible Industrial Development Emma Rose Property, dated October 20th, 1925, revised 10/26/25, Coast Division, Dr. No. 18198."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

With respect to the track at Emeryville, shown on Exhibit "L," having a length of 8,217 feet, the longest particular track of that group is 3,200 feet. We divided up the length to show that there were three tracks having a total length of 8,217 feet. [205]

Plaintiff's Exhibit 17 consists of a certified copy of the Articles of Incorporation of the Western Pacific California Railroad Company showing that that company was incorporated on July 10, 1928.

Plaintiff's Exhibit 18 consists of a copy of the located center line of the Western Pacific California Railroad Company and the resolutions of the Board of Directors of that company adopting said center line of location at a meeting held on March 26, 1929.

There was received in evidence at this time as Plaintiff's Exhibit 20 a photostatic copy of a diagram entitled "(3) Preliminary Plan Showing

Proposed Location of Pier to Deep Water Channel of San Francisco Bay from East San Mateo."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

There was received in evidence at this time Plaintiff's Exhibit 21 photostatic copy of map entitled "(2) Map of East San Mateo Lands, Property of Emma Rose, San Mateo, Cal., May, 1921, by George A. Kneese, County Surveyor."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

There was received in evidence at this time as Plaintiff's Exhibit 22 map entitled "Southern Pacific Co., San Mateo-Leslie Proposed Industrial Development Emma Rose Property, dated October 20th, 1925, revised 10/26/25, revised 12/9/25, revised 12/11/25, Coast Division Dr. No. 18198, F. 30, No. B 8093."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

There was received in evidence at this time as Plaintiff's Exhibit 23 map entitled "Southern Pacific Company, San Mateo-Leslie, Possible Industrial Development Emma Rose Property, dated October 20th, 1925, revised 10/26/25, Coast Division Dr. No. 18198, F. 30 No."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

There was received in evidence at this time as Plaintiff's Exhibit 24 blue-print entitled "Southern Pacific Co., San Mateo-Leslie [206] Proposed In-

dustrial Development Emma Rose Property, dated October 20th, 1925, revised 10/26/25, revised 12/9/25, revised 12/11/25, revised Sept. 13, 1927, Coast Division, Dr. No. 18198, Sheet 1, F. 30. No. B8093, G. M. O. 68280."

(Original exhibit transmitted to Circuit Court of Appeals under order of District Court.)

There was received in evidence as Plaintiff's Exhibit 27 the opinion and order of the Railroad Commission of the State of California in the case numbered and entitled "In the Matter of the Investigation on the Commission's Own Motion into installation, maintenance, protection and operation of crossing of the railroad tracks of Southern Pacific Company with state highway near southern limits of City of San Mateo, and to determine necessity for separation of grades, Case No. 2757." The contents of this exhibit so far as pertinent herein are as follows:

"The Department of Public Works of the State of California, through its Director, raised the question as to whether or not this Commission could afford the Department any relief in connection with a controversy which had arisen between it and Southern Pacific Company, in connection with the construction of a new State Highway (Bay Shore) over a disconnected spur-track built by Southern Pacific Company near the southerly limits of the City of San Mateo. Thereupon, the Commission, on its own motion, instituted an investigation into the installation, maintenance, protection and opera-

tion of said crossing. Hearings were held at San Francisco on October 18th and 29th, at which time both parties agreed to submit to the Commission, for determination, the question as to how the projected crossing between the railroad and highway should be effected and apportion the cost of the same.

"The Bay Shore Highway is being constructed for the purpose of providing, in advance of development, a thoroughfare which can be maintained as a permanent high-speed artery to ultimately connect the City of San Francisco with San Jose by a route along the westerly [207] shore of San Francisco Bay, which is, in general at some distance from the built-up section of the peninsula. With the intense development of this territory, the need of this artery will be far greater than at present and it has been located so as to avoid the delays incident to travel over El Camino Real, the present state highway. If this purpose is to be accomplished, there must be a minimum of obstructions by the cities en route and by other agencies.

"The highway has been constructed and is now open to travel between San Francisco and Fifth Avenue, in the City of San Mateo. Beyond Fifth Avenue, the proposed route follows a dedicated public street for a short distance and then continues across private property, known as the Emma Rose Estate. The State, at the present time, owns no right-of-way across the Emma Rose property but, on April 16th of this year, filed a condemnation suit

against Emma Rose and Southern Pacific Company. It has declared its intention to construct the highway southerly from Fifth Avenue to Palo Alto during the next year.

"Southern Pacific Company has, for some time, carried on negotiations with the Emma Rose Estate for the construction of a spur track into the property to be developed for industrial purposes. On March 18th, 1929, a fifty-foot right-of-way for a spur track, connecting with the main line of Southern Pacific Company near its Leslie Station, was deeded to Southern Pacific Company and immediately Southern Pacific Company laid approximately 1400 feet of skeleton track on this right-of-way, a portion of this construction being across the proposed routes of both the Bay Shore Highway and the Western Pacific California Railroad Company, a subsidiary of The Western Pacific Railroad Company. This skeleton track does not connect with any track of Southern Pacific Company and, at its nearest point, is 2200 feet distant from the nearest operative track. The ties on which the rails are spiked are widely spaced; no ballast has been applied and the entire construction is such as to be incapable of being subject to railroad operation even if it were physically [208] connected to operative trackage.

"The Commission cannot recognize a mere intention of the State or other political body, to acquire a right-of-way and construct a public thoroughfare, as constituting a public road such as referred to in

Section 43 of the Public Utilities Act, nor, on the other hand, can it consider a few connected rails and ties, which are incapable of being operated over as a railroad, as being the track of a railroad referred to in that section. In the present case, however, a full and complete record as to the necessity, hazards, terms of installation and manner of crossing, has been developed and, since both parties have submitted the matter to this Commission for decision, it appears appropriate that the Commission finally determine the crossing matter at this time, particularly since it is apparent that both the highway and spur-track will be constructed in the near future.

"While the evidence in this case shows that for some time to come the switching operations over the railroad would not seriously interfere with the full use of the new highway, yet, if the purpose of the state in the construction of this highway is to be realized, the greatest caution should be used in permitting the establishment of any obstacle to the flow of traffic.

"From the record in this proceeding, it is apparent that a grade separation is physically feasible and can be constructed at a cost ranging between $75,000 and $115,000, depending on the type of structure used. The most feasible manner appears to be to carry the railroad track over the highway and depressing slightly the grade of the highway.

"It is my opinion that this crossing should be constructed at separated grades in the above manner

but the details as to the type of structure and the fixing of the grades should be worked out between the parties or, if the parties fail to agree, the Commission can then decide as to these details. In fixing the grade lines, attention [209] should be given to the crossing of the spur with the proposed track of the Western Pacific California Railroad Company.

"If the area proposed to be developed as an industrial area does reach the full development of which it is capable, the cost of a separation of grades will be very nominal when compared to the revenue derived from freight or the increased value it will give the land to be served. On the other hand, the moving factor in this grade separation is the greater convenience and safety for the automobile using public.

"After carefully considering the record in this proceeding, it seems to me that the cost of constructing said separation should be equally divided between the Department of Public Works of the State of California and the Southern Pacific Company.

"The following form or order is accordingly recommended:

ORDER.

"The Commission having instituted an investigation on its own motion in the above-entitled matter, hearings having been held and both the Department of Public Works of the State of California and Southern Pacific Company having submitted the matter to the Commission for determination as to

the manner of constructing the crossing and apportionment of the cost;

"IT IS HEREBY ORDERED that if and when the Department of Public Works of the State of California and Southern Pacific Company, or either of them, desire to construct the crossing of a State Highway and a spur-track, in the vicinity of Engineer's Station 725, as shown on Sheet 6 of Exhibit 1, entitled 'Plan and Profile of Proposed State Highway in San Mateo County,' filed in this proceeding, said crossing shall be constructed subject to the following conditions and not otherwise:

"(1) Said crossing shall be constructed at separated grades and said separation of grades shall be effected by constructing the railroad track above the State Highway. [210]

"(2) The cost of effecting said separation of grades, including the approaches on the railroad and any excavation which may be necessary in connection with the change in grade of the highway, shall be borne fifty (50) per cent by Southern Pacific Company and fifty (50) per cent by the Department of Public Works of the State of California."

It was admitted by counsel for plaintiff that the Southern Pacific Company is the lessee of the Southern Pacific Railroad Company and is operating that railroad. Counsel for the plaintiff also admitted that the Western Pacific California Railroad Company is a subsidiary of the Western Pacific Railroad Company.

Defendant's Exhibit "P" contains the resolutions adopted by the Executive Committee of the

Southern Pacific Company which sustain and support the authorities for expenditure which were introduced in evidence as Plaintiff's Exhibit 5. There is attached to this exhibit a memorandum from the Executive Committee's record showing that under the By-Laws of the Southern Pacific Company the last authority for expenditure was within items which had been authorized by the President, costing under the sum of $10,000.

Defendant's Exhibit "Q" consists of a certified copy of the By-Laws of the Southern Pacific Company sustaining the authority which was exercised by the executive committee and showing that expenditures less than $10,000, relating to a project already under way, may be authorized by the president without authority of the executive committee.

Defendant's Exhibit "Q–1" consists of a copy of the by-laws of the Southern Pacific Company as amended on April 14, 1927, which were in effect at the time the second revision of the authority for expenditure was made. These by-laws also show the authority of the executive committee in approving the authorities for expenditure and also the authority of the president of the Southern Pacific Company to authorize expenditures less than $10,000 relating to a project already [211] under way.

Counsel for the defendant stated that no point is made of the fact that the Southern Pacific Railroad Company is doing the construction of the track involved in this proceeding. The deed granted the right of way to the Southern Pacific Railroad Com-

pany but the Southern Pacific Company of Kentucky is lessee of that company and is operating that line of railroad.

Defendant's Exhibit "R" consists of a certified copy of a report proposed by Examiner O. D. Weed in Finance Docket No. 7025, relating to the proposed construction of the line of the Western Pacific California Railroad Company, in which the examiner recommends that the Western Pacific California Railroad Company be denied a certificate of public convenience and necessity permitting it to construct its proposed line of railroad between San Francisco and Redwood City.

Plaintiff's Exhibit 25 consists of a copy of the order of the Interstate Commerce Commission reopening proceedings in Finance Docket 7025, relating to the proposed construction of plaintiff's railroad between San Francisco and Redwood City. The order is as follows:

> "Upon further consideration of the record in the above-entitled proceeding of the petition of Western Pacific California Railroad Company for re-opening of said proceeding to permit of the filing of an amended petition and hearing thereon and of the answer of Southern Pacific Company to said petition, it is ordered that said petition of Western Pacific California Railroad Company be and it is hereby granted."

Plaintiff's Exhibit 26 (original exhibit transmitted to the Circuit Court of Appeals under order of District Court) consists of a photostatic copy

of a map which delineates the city limits of San Mateo.

Counsel for the plaintiff admitted that plaintiff had abandoned the argument with regard to the priority of location with respect to the crossing of the proposed route of the Western Pacific California Railroad Company by the track commenced by defendant on March 23, 1929. That point was abandoned when plaintiff discovered that its [212] resolution of location was adopted after March 23, 1929, upon which date the Southern Pacific commenced the construction of its track.

At the conclusion of the introduction of evidence before the master, and pursuant to arrangements between counsel for the respective parties, the master personally examined the 1400 feet of track, more or less, referred to in the record, the Emma Rose property and the other property in and about San Mateo, including the constructed portion and the projection across the Emma Rose property of the Bay Shore highway, and the projected line of plaintiff across the Emma Rose property and from the San Francisco Bay Toll Bridge Highway and from the San Francisco Bay Toll Bridge viewed the property lying along the shore of San Francisco Bay in that vicinity.

[Endorsed]: Filed July 16, 1930. [213]

[Title of Court and Cause.]

ORDER FOR TRANSMITTAL OF MAPS, DIAGRAMS, ORIGINAL PAPERS AND EXHIBITS TO CIRCUIT COURT OF APPEALS.

It being the opinion of the Presiding Judge of the District Court of the United States in and for the Northern District of California, Southern Division, that it is necessary and proper that certain maps, diagrams, original papers and exhibits, the transmittal of which was not requested by the defendant and which were introduced in evidence at the trial of the above-entitled matter, be inspected in the Circuit Court of Appeals for the Ninth Circuit on the appeal herein,—

IT IS HEREBY ORDERED that such maps, diagrams, original papers and exhibits need not be printed as part of the record herein and that the Clerk of this court deliver same to said Circuit Court of Appeals for filing with the records in this case in connection with the transcript of the proceedings therein, and that after said maps, diagrams, original papers and exhibits have been inspected by said Circuit Court of Appeals, same shall be returned to the Clerk of said District Court, said maps, [214] diagrams, original papers and exhibits being:

Plaintiff's Exhibit 2, Transcript, page 10.
Plaintiff's Exhibit 3, Transcript, page 14.
Plaintiff's Exhibit 4, Transcript, page 42.

Plaintiff's Exhibit 7, Transcript, page 63.
Plaintiff's Exhibit 11, Transcript, page 168.
Plaintiff's Exhibit 19, Transcript, page 349.
Plaintiff's Exhibit 20, Transcript, page 361.
Plaintiff's Exhibit 21, Transcript, page 362.
Plaintiff's Exhibit 22, Transcript, page 362.
Plaintiff's Exhibit 23, Transcript, page 362.
Plaintiff's Exhibit 24, Transcript, page 362.

FRANK H. NORCROSS,
Presiding Judge, United States District Court.

16th day of July, 1930.

[Endorsed]: Filed Jul. 16, 1930. [215]

(Title of Court and Cause.)

ORDER FOR TRANSMITTAL OF ORIGINAL MAPS AND EXHIBITS TO CIRCUIT COURT OF APPEALS.

It being the opinion of the Presiding Judge of the District Court of the United States in and for the Northern District of California, Southern Division, that it is necessary and proper that the original maps or blue-prints and certain exhibits be inspected in the Circuit Court of Appeals for the Ninth Circuit on appeal it is hereby ordered that the Clerk deliver such original maps or blue-prints and exhibits to said Circuit Court of Appeals for filing with the record in this case in connection with the transcript of the proceedings therein and that after such inspection by said Circuit Court of Appeals said original maps or blue-prints and exhibits

be returned to the Clerk of said District Court, such maps, blue-prints and exhibits being:

Plaintiff's Exhibit 1—Transcript, page 7.
Plaintiff's Exhibit 5—Transcript, page 46.
Plaintiff's Exhibit 26—Transcript, page 362.
Defendant's Exhibit "C"—Transcript, page 201.
Defendant's Exhibit "F" (1, 2, 3)—Transcript, page 287.

FRANK H. KERRIGAN,
Presiding Judge, United States District Court.

Filed May 26, 1930. [215A]

[Title of Court and Cause.]

ORDER AUTHORIZING THE REPRODUCTION OF CERTAIN TESTIMONY BY QUESTION AND ANSWER AND THE TRANSMITTAL OF CERTAIN ORIGINAL EXHIBITS TO THE CIRCUIT COURT OF APPEALS, AND APPROVING AND ALLOWING STATEMENT OF EVIDENCE UNDER EQUITY RULE 75.

It appearing to the Court: That defendant (appellant) duly lodged with the Clerk of this court its proposed statement of evidence and gave due notice of such lodgment and of the time of the proposed settlement thereof to the solicitors for plaintiff (appellee), which time has been extended by stipulation of parties and by order of this Court to July 16, 1930, at 10 o'clock A. M., or as soon

thereafter as counsel can be heard; that plaintiff duly lodged in said Clerk's office amendments proposed by it to the statement of evidence proposed by the defendant; that the same has been satisfactorily adjusted and settled by stipulation of the parties and included in an "Agreed Condensed Statement of Evidence"; that said "Agreed Condensed Statement of Evidence" contains all of the evidence introduced in the above-entitled cause essential to the decision of the questions presented by the appeal, except certain exhibits, the [216] originals of which are to be transmitted to the Circuit Court of Appeals under order of this Court, said evidence being stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted, and the testimony of witnesses being stated in narrative form, except that certain portions of the testimony are reproduced by question and answer so that the evidence may be clearly understood; and that the exhibits referred to and designated in said "Agreed Condensed Statement of Evidence" as transmitted to the Circuit Court of Appeals under order of this Court are inappropriate for insertion in the printed record.

IT IS THEREFORE ORDERED: That the portions of the testimony reproduced by question and answer in said "Agreed Condensed Statement of Evidence" be so reproduced in the record on appeal; that the exhibits referred to and designated in said "Agreed Condensed Statement of Evidence" as transmitted to the Circuit Court of Appeals

under order of this Court, be so transmitted by the Clerk of this court; and that said "Agreed Condensed Statement of Evidence" be and the same is hereby approved and allowed as a true, complete and correct statement of the evidence introduced in said cause, and the same is ordered filed as the statement of the evidence to be included in the record on appeal in the above-entitled cause, as provided in paragraph (b) of Equity Rule 75.

Dated: July 16, 1930.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed Jul. 16, 1930. [217]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL.

To the Honorable FRANK H. KERRIGAN, District Judge:

Now comes the Southern Pacific Company, defendant herein, by C. O. Amonette, H. C. Booth and C. W. Durbrow, its attorneys, and feeling aggrieved by the final decree of this Court rendered and entered in the above-entitled cause on the 28th day of February, 1930, perpetually enjoining and restraining defendant from constructing a certain railroad track unless and until defendant has first obtained from the Interstate Commerce Commission of the United States its certificate that the

present or future public convenience and necessity require or will require the construction of said track, hereby prays that an appeal may be allowed to it from said decree to the Circuit Court of Appeals for the Ninth Circuit because of the errors specified in the assignment of errors filed in connection with this petition.

Petitioner further prays that a citation may issue as provided by law, that a transcript of the record, proceedings and papers on which said decree was based be made and duly authenticated and lodged in said Circuit Court of Appeals at the city of San Francisco, State of California, and that the [218] amount of security for costs may be fixed by the order allowing the appeal.

Dated: May ——, 1930.

C. O. AMONETTE,
H. C. BOOTH,
C. W. DURBROW,
Solicitors for Defendant.

G. V. SHOUP,
Of Counsel.

ORDER.

This appeal allowed and a bond for appeal is fixed at one thousand dollars ($1,000.00).

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed May 26, 1930. [219]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the appellant, Southern Pacific Company, by C. O. Amonette, H. C. Booth and C. W. Durbrow, its solicitors, and in connection with its petition for appeal says, that in the record, proceedings and in the final decree aforesaid manifest error has intervened to the prejudice of the appellant to wit:

I.

The Court erred in overruling appellant's exceptions to report of the Special Master.

II.

The Court erred in overruling appellant's exception Number 2 to Finding Number 7 of the Special Master's Report which is in substance that said finding is contrary to the evidence because said finding embraces territory not involved in this proceeding and that the only territory so involved is the parcel of land embracing not more than 500 acres which has heretofore been served by appellant and which is not new territory. [220]

III.

The Court erred in overruling appellant's exception Number 3 to Finding Number 11 of the Special Master's Report which is in substance that the master should have found but failed to find from the uncontradicted evidence that appellant intended to construct a track extending only as far from its

main line track as the southwesterly line of the San Francisco Bay Toll Bridge right of way in the manner and only of a length required by the deed executed by Emma Rose granting appellant a right of way over 500 acres of land immediately adjacent to appellant's main line right of way and that the uncontradicted evidence proves that appellant intended to use said track solely and exclusively to serve said 500 acres of land, and that appellant did not plan to serve an unlimited territory extending to the bay of San Francisco or any other territory except said 500 acres of land.

IV.

The Court erred in overruling appellant's exception Number 5 to Finding Number 15 of the Special Master's Report which is in substance that the master erred in finding that the purpose of appellant was and is to extend any railroad at the easterly and northerly and southerly and approximately parallel with the railroad of appellee and that said finding is contrary to the evidence because in this respect the master should have found but failed to find that the purpose of appellant was and is only to construct said track from a point on its main line easterly to the southwesterly line of the San Francisco Bay Toll Bridge right of way. [221]

V.

The Court erred in overruling appellant's Exception Number 6 to Finding Number 16 of the Special Master's Report which is in substance that the master erred in finding that said track will be ex-

tended as stated in the Master's Finding Number 15 and that in this respect said finding is contrary to the uncontradicted evidence and that the master should have found but failed to find that said track was built for the sole and exclusive purpose of developing industrially said 500 acres of land, owned by one Emma Rose, and meeting existing demands for railroad service thereon.

VI.

The Court erred in overruling appellant's Exception Number 7 to Finding Number 19 of the Special Master's Report which is in substance that said finding is contrary to the uncontradicted evidence and that the master should have found but failed to find from the undisputed evidence that appellant's track was constructed in accordance with appellant's consistant policy of developing industrial territory adjacent to its main line right of way; that this particular project was conceived in 1921, construction of the track was authorized April 29, 1926, prior to the incorporation of appellee July 10, 1928, and that the deed granting appellant a right of way across the property owned by said Emma Rose was accepted with the express condition that appellant should not oppose the crossing of the proposed line of railroad to be constructed by appellee or any affiliated corporation across appellant's right of way and that if said crossing was approved by the Railroad Commission of the State of California appellant should grant to appellee the right to cross said track subject to

the usual and customary form of crossing agreement. [222]

VII.

The Court erred in overruling appellant's Exception Number 8 to Finding Number 21 of the Special Master's Report which is in substance that the master's findings that the maintenance and operation of appellant's track across the railroad of plaintiff would seriously impede and render more difficult and hazardous and expensive the construction of appellee's railroad and the operation thereof, is contrary to the undisputed evidence and is unsupported by any evidence.

VIII.

The Court erred in overruling appellant's Exception Number 9 to Finding Number 22 of the Special Master's Report which is in substance that the master's finding that the maintenance and operation of the railroad of appellant into said territory will destroy, in a substantial measure, the value of appellee's railroad by decreasing the business and revenue of appellee's railroad and impeding or rendering more difficult and expensive the giving of railroad service to said new territory, is contrary to the undisputed evidence and is unsupported by any evidence.

IX.

The Court erred in overruling appellant's Exception Number 10 to the Special Master's report which is in substance that the master should have found but failed to find that the location of appellant's track was made prior to the incorporation of ap-

pellee, prior to the location of appellee's proposed railroad, prior to the location of the Bay Shore highway and that appellant actually began constructing its track prior to the time appellee located its proposed railroad. [223]

X.

The Court erred in overruling appellant's Exception Number 12 to the Special Master's Report which is in substance that the master should have found but failed to find from the undisputed evidence that appellant's track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks by appellant and other California carriers.

XI

The Court erred in overruling appellant's Exception Number 13 to the Special Master's Report which is in substance that the master should have found but failed to find from the undisputed evidence that appellant's track, when constructed, will be operated in the same manner as other industrial tracks, will be used exclusively for switching carload freights from and to industries and will have none of the attributes or characteristics of main or branch lines and will not constitute an extension as that term is used in Paragraph 22 of section 1 of the Interstate Commerce Act.

XII.

The Court erred in overruling appellant's Exception Number 14 to the Special Master's Report which is in substance that the master should have

found but failed to find that said track, when constructed, will be an industrial spur and switching track in accordance with the meaning of these terms as they appear in paragraph 22 of section 1 of the Interstate Commerce Act.

XIII.

The Court erred in overruling appellant's Exception Number 15 to the Special Master's Report which is in substance that the master should have found but failed to find from the undisputed evidence that the authorities for expenditure governing [224] the construction of said track were made in compliance with provisions of Valuation Order No. 3 of the Interstate Commerce Commission and adopted by appellant's executive committee with the intention of only constructing said track upon its main line right of way of a length of 1960 feet and extending thence across the land of said Emma Rose of a length of 7,750 feet for the sole and exclusive purpose of serving industries to be located thereon.

XIV.

The Court erred in overruling appellant's Exception Number 16 to the Special Master's Report which is in substance that the master should have found but failed to find that said Emma Rose land upon and across which appellant's said track is to be constructed was at the time appellant located said track and is now a part of the territory being served by appellant and was not at said time and is not now being served by any other common carrier.

XV.

The Court erred in confirming the report of the Special Master and in adopting the Special Master's finding of fact and conclusions of law as those of the Court.

XVI.

The Court erred in overruling appellant's Exception Number 17 to the Master's Conclusion of Law Number 2 which is in substance that the master erred in concluding that the appellant, by its plan and construction, has undertaken the extension of its line without having obtained from the Interstate Commerce Commission a certificate as required by Paragraph 18 of section 1 of the Interstate Commerce Act and that the master should have concluded that said track is not an extension of [225] appellant's line and that said track is a spur, industrial or switching track as defined by paragraph 22 of section 1 of said Act, expressly excepted from the provisions of section 18 thereof and that therefore appellant is not required to obtain such certificate.

XVII.

The Court erred in overruling appellant's Exception Number 18 to the Master's Conclusion of Law Number 3 which is in substance that the master erred in concluding that appellant, by its plan and construction has not undertaken the construction of a spur, industrial, team, switching or side track and that the master should have concluded but failed to conclude that appellant, by its plan of construction, has undertaken the construction of a spur, industrial or switching track.

XVIII.

The Court erred in overruling appellant's Exception Number 19 to the Master's Conclusion of Law Number 4 which is in substance that the master erred in concluding that appellant's construction is contrary to the provision of Paragraph 18 of section 1 of the Interstate Commerce Act and that under the provisions of Paragraph 20 of said section the construction may be enjoined by appellee and that the plaintiff is a party in interest, and that the master should have concluded but failed to conclude that the provisions of said Paragraph 18 are inapplicable to the construction of said track and that the construction of said track is governed by the provisions of paragraph 22 of said action and the appellant may legally construct said track without obtaining any certificate from said Interstate Commerce Commission, and that the plaintiff is not a party in interest and that plaintiff's complaint should be dismissed. [226]

XIX.

The Court erred in overruling appellant's Exception Number 20 to the Master's Conclusion of Law Number 5 which is in substance that the master erred in concluding that appellee is entitled to injunction and that the master should have concluded but failed to conclude that appellee's complaint should be dismissed.

XX.

The Court erred in granting the injunction perpetually enjoining appellant or any of its officers, agents or employees or any person acting by or

through or under them or any of them from constructing, maintaining or operating its railroad track unless and until it has first obtained a certificate from the Interstate Commerce Commission that the present or future public convenience or necessity requires or will require the construction of said track since said track would be a spur, industrial or switching track to be located wholly within one state as provided by paragraph 22 of section 1 of the Interstate Commerce Act over which the Interstate Commerce Commission has no authority.

XXI.

The Court erred in denying appellant's motion for an order limiting the scope and effect of the permanent injunction granted plaintiff so as only to restrain appellant from constructing, maintaining and operating its partially completed railroad track across or into any territory which lies easterly and northeasterly of the western boundary of the San Francisco Bay Toll Bridge right of way and northerly and southerly of the boundaries of the property owned by one Emma Rose unless and until the appellant shall have first obtained from the Interstate Commerce Commission its certificate that the present or future public convenience and necessity requires or will require the construction or operation [227] or construction and operation of said railroad track and so as not to restrain the appellant from completing the construction of said railroad track and maintaining and operating said track within the limits of the property of said Emma Rose.

XXII.

The Court erred in granting appellee a permanent injunction broader and more comprehensive than the findings of fact and conclusions of law justify and/or the necessity of the case require.

XXIII.

The Court erred in denying appellant's prayer and motion to dismiss appellee's bill of complaint made upon the ground that appellee is not a party in interest as provided by Paragraph 20 of Section 1 of the Interstate Commerce Act.

XXIV.

The Court erred in making and entering its final decree entered February 28, 1930, and decreeing in favor of the appellee and against the appellant and granting the permanent injunction.

And the said Southern Pacific Company, appellant, prays that the decree of the said District Court of the United States for the Northern District of California, Southern Division, granting the injunction prayed for in appellee's bill of complaint, on account of the errors aforesaid, may be reversed and annulled, and that a decree may be entered dissolving said injunction and dismissing said bill of complaint.

C. O. AMONETTE,
H. C. BOOTH,
C. W. DURBROW,
Solicitors for Appellant.

G. V. SHOUP,
Of Counsel.

[Endorsed]: Filed May 26, 1930. [228]

[Title of Court and Cause.]

BOND ON APPEAL.

(Seal)

KNOW ALL MEN BY THESE PRESENTS: That we, Southern Pacific Company, a corporation, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Western Pacific California Railroad Company, a corporation, in the full and just sum of one thousand ($1,000.00) dollars, to be paid to the said Western Pacific California Railroad Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of May, in the year of our Lord one thousand nine hundred and thirty.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division in a suit depending in said court, between Western Pacific California Railroad Company, a corporation, plaintiff, against Southern Pacific Company, a corporation, defendant, a decree was rendered against the said Southern Pacific Company and the said Southern Pacific Company having obtained from said Court an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Western Pacific Cali-

fornia Railroad Company citing and admonishing [229] it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty (30) days from the date hereof.

Now, the condition of the above obligation is such, that if the said Southern Pacific Company shall prosecute its appeal to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

[Seal] SOUTHERN PACIFIC COMPANY.
By J. H. DYER,
Vice-president.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
[Seal] By ERNEST W. COPELAND.

Acknowledged before me the day and year first above written.

Form of bond and sufficiency of surety approved.
FRANK H. KERRIGAN,
Judge. [230]

State of California,
City and County of San Francisco,—ss.

On this 26th day of May, in the year one thousand nine hundred and thirty before me, W. W. Healey, a notary public in and for the city and county of San Francisco, personally appeared Ernest W. Copeland, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as attorney-in-fact.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco,—ss.

On this 26th day of May, in the year one thousand nine hundred and thirty, before me, Frank Harvey, 65 Market St., a notary public in and for the city and county of San Francisco, State of California, personally appeared J. H. Dyer, known to me to be the vice-president of the Southern Pacific Company, the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and *they* acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office

in the city and county of San Francisco, the day and year in this certificate first above written.

[Seal] FRANK HARVEY,

Notary Public in and for the City and County of San Francisco, State of California.

Corporation

My commission expires June 20, 1931.

[Endorsed]: Filed May 26, 1930. [231]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

Now comes Southern Pacific Company, defendant in the above-entitled cause, and requests that the record to be transmitted to the Circuit Court of Appeals (Ninth Circuit) on its appeal from the final decree therein contain the following:

A. Caption.

1. Amended complaint for injunction.
2. Defendant's answer to amended complaint for injunction, including Exhibit "A" attached thereto.
3. Memorandum opinion of Court in disposing of motions and granting preliminary injunction.
4. Order denying motions and appointing Special Master.
5. Report of Special Master.

6. Defendant's exceptions to report of Special Master.
7. Order overruling defendant's exceptions to the report of the Special Master, confirming master's report and awarding plaintiff injunction.
8. Specifications of reasons why decree prepared by counsel for plaintiff for signature of Court is disapproved by counsel for defendant.
9. Final decree filed February 28, 1930.
10. Defendant's motion to limit scope and effect of permanent injunction.
11. Order of Court denying defendant's motion to limit scope and effect of permanent injunction. [232]
12. Condensed statement of evidence.
13. Order for transmittal of original maps and exhibits to Circuit Court of Appeals.
14. Defendant's petition for appeal and order of Court allowing appeal.
15. Defendant's assignment of errors.
16. Defendant's appeal bond for costs.
17. Citation.
18. This praecipe.

SOUTHERN PACIFIC COMPANY.
By C. O. AMONETTE,
H. C. BOOTH,
C. W. DURBROW,
Solicitors for Defendant.

G. V. SHOUP,
Of Counsel.

Receipt of copy of the within praecipe for transcript of record on appeal is admitted this 26th day of May, 1930.

F. M. ANGELLOTTI,
WARREN OLNEY, Jr.,
Attorneys for Plaintiff.

[Endorsed]: Filed May 26, 1930. [233]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 237 pages, numbered from 1 to 233, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $72.50; that the said amount was paid by the appellant and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 18th day of August, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [234]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to Western Pacific California Railroad Company, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Southern Pacific Company is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California this 26th day of May, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of a copy thereof is hereby admitted this 26th day of May, 1930.

F. M. ANGELLOTTI,
WARREN OLNEY, Jr.,
Attorneys for Plaintiff (Appellee).

United States of America,—ss.

On this 26th day of May, in the year of our Lord one thousand nine hundred and thirty, personally appeared before me, C. O. Amonette, the subscriber, and makes oath that he delivered a true copy of the within citation to J. M. Mannon, Jr., atty. for plaintiff (appellee).

C. O. AMONETTE.

Subscribed and sworn to before me at San Francisco, this 26th day of May, A. D. 1930.

R. M. GREEN,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed May 26, 1930. [235].

[Endorsed]: No. 6226. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Appellant, vs. Western Pacific California Railroad Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 20, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6226

United States

Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellant,

vs.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY, a Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the fourth day of December, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. C. W. Durbrow, counsel for the appellant, and by Mr. F. M. Angellotti, counsel for the appellee, and submitted to the court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of February, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable

CURTIS D. WILBUR, Circuit Judge; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before RUDKIN and WILBUR, Circuit Judges, and NORCROSS, District Judge.

PER CURIAM.—July 10, 1928, the Western Pacific California Railroad Company was organized as a corporation under the laws of the State of California for the purpose, among others, of constructing and operating a standard gauge line of railroad commencing at a point in the City and County of San Francisco and extending thence in a general

southerly direction to and beyond Redwood City, in San Mateo County, California, the purpose of the construction being to enable the company to carry freight and other traffic for hire as a common carrier from and to points on the line of the proposed road between its termini. The Western Pacific Company applied to the Interstate Commerce Commission for a certificate of necessity authorizing the construction of the road, as required by the Transportation Act of 1920 (49 U. S. C. A. § 1, Par. 18), and that application was still pending at the time of the final hearing in the court below.

The Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and has for many years last past operated as owner, or lessee, a line of railroad extending from the City of San Francisco in a southerly direction to and beyond Redwood City, California. The latter company is also a common carrier organized for the purpose of transporting persons and property in interstate and intrastate commerce for hire. The existing line of the Southern Pacific parallels the proposed line of the Western Pacific throughout its entire length, the two lines being approximately one-half mile apart. On March 23, 1929, the Southern Pacific Company commenced the construction of a railroad track, or spur, across the proposed line of the Western Pacific at a point near the limits of the City of San Mateo. This proposed line is to be about 8,200 feet in length and will extend from the main line in an easterly direction towards San Francisco Bay.

Paragraph 18 of Section 1, *supra,* provides that no carrier subject to the act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under the act, over or by means of such additional line of railroad, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line. Paragraph 20 of the same section provides that any construction or operation contrary to the provisions of paragraph 18 may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest. Paragraph 22 of the same section provides that the authority conferred on the Commission by paragraph 18 shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The present suit was instituted by the Western Pacific Company against the Southern Pacific Company to enjoin the construction or the contemplated track by the Southern Pacific on the ground that the latter company had not obtained a

certificate of necessity from the Interstate Commerce Commission, as required by paragraph 18, *supra*. From a final decree granting a permanent injunction, the Southern Pacific Company has appealed. Two questions are presented for consideration. First, is the Western Pacific Company a party in interest within the meaning of paragraph 20, and, second, is the 8200-ft. track contemplated by the appellant an extension within the meaning of paragraph 18, or is it a spur or industrial track within the meaning of paragraph 22?

As appears from the foregoing statement, the appellee has been organized as a corporation, has projected a line of railroad and has applied to the Interstate Commerce Commission for a certificate of necessity. On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant from building a spur track, or extending its line, as the case may be. Such showing will not, in our opinion, support or justify an injunction such as was granted here.

> "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending, and threatened so as to

be averted only by the protecting preventive process of the injunction." Truly vs. Wanzer, 5 How. 140, 142.

"The complainant must establish a clear legal right, not doubtful, nor uncertain, and the injury threatened must be of a permanent and irreparable character. Where the complainant's title is doubtful, equity will not relieve by injunction. * * * It is the duty of the court when an injunction bill has been filed to inquire and ascertain whether the individual or corporation seeking the relief has a clear legal right to the use, occupation, or enjoyment of the property or right, the invasion of which is sought to be enjoined. These are elementary principles in a proceeding in equity. The complainant must rely on the strength of his own title, or other legal right, and not on the weakness of the title or legal right asserted by the respondent."

Again: "The appellant is seeking equitable relief, and has the burden of establishing a clear legal title to the use and occupation of the streets and the possession of the rights of way in dispute. It has failed to show that it has any valid or existing ordinance giving it the right to the use of the streets in question, nor has it proven title to the disputed rights of way, and it necessarily follows that the clear legal right necessary to sustain this proceeding has not been established." Myersdale & S. St. Ry. Co. vs. Pennsylvania & M. St. Ry. Co., 69 Atl. 92, 94, 95.

"An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action, or to prevent the perpetration of an act prohibited by statute in favor of one who urges as his only ground for relief the diminution of the profits of a trade or business pursued by complainant in common with others.

"Where complainant's right is doubtful or his title is in dispute, a perpetual injunction cannot be obtained until the doubt is removed by a proper proceeding and the right made certain, the only proper relief which may be granted in such cases being a temporary injunction maintaining the status quo until the right or title in question is established. A permanent injunction should not be awarded except in a clear case and to prevent irreparable injury." 32 C. J. 35, 36.

Under these authorities and many others that might be cited, it was error to grant a permanent injunction on the facts before the court. Had the application of the appellee for a certificate of necessity been finally denied by the Interstate Commerce Commission before the suit was instituted, or before final decree, the error would seem apparent, because in that event the appellant would have been restrained from constructing a spur track, or extending its line, at the suit of an utter stranger without the slightest interest in the pending controversy. Had the application been denied pending the appeal the error would seem equally apparent; and the fact

that the application has since been granted, if such be the fact, does not change the nature of the appellee's right or title at the time the final decree was entered. For this error, the decree must be reversed.

In view of this conclusion, we deem it unnecessary, if not improper, to consider the doubtful and perplexing question whether the line contemplated by the appellant is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission.

Reversed and remanded.

[Endorsed]: Opinion. Filed Feb. 9, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

No. 6226.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellant,

vs.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY, a Corporation,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ORDERED, ADJUDGED, AND DECREED by this court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellant and against the appellee, and that this cause be, and hereby is remanded to the said District Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by this court that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Feb. 9, 1931. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of March, in the year of

our Lord one thousand nine hundred and thirty-one. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellee, filed March 9, 1931, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

APPLICATION FOR ORDER STAYING ISSUANCE OF MANDATE.

Appellee respectfully represents to this Honorable Court that it proposes to apply to the Supreme Court of the United States for the issuance of a writ of certiorari in the above-entitled cause, and for that reason asks that the issuance, under Rule 32, of the mandate of this court in the above-entitled cause be stayed to and including April 27, 1931, and that in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, such

mandate of this court be stayed until after said Supreme Court finally acts upon said petition.

Dated March 18, 1931.

F. M. ANGELLOTTI,
A. S. HUTCHINSON,
H. P. TYLER,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 18, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of the appellee, through its counsel, and good cause therefor appearing, IT IS ORDERED that the issuance under Rule 32, of the mandate of this court be and hereby is stayed to and including April 27, 1931, and in the event the petition for writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court finally acts upon said petition.

Dated March 18, 1931.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Mar. 18, 1931. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and twenty-five (325) pages, numbered from and including 1 to and including 325, to be a full, true and correct copy of the entire records excluding original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of March, A. D. 1931.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 25, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
APR 20
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. [redacted] 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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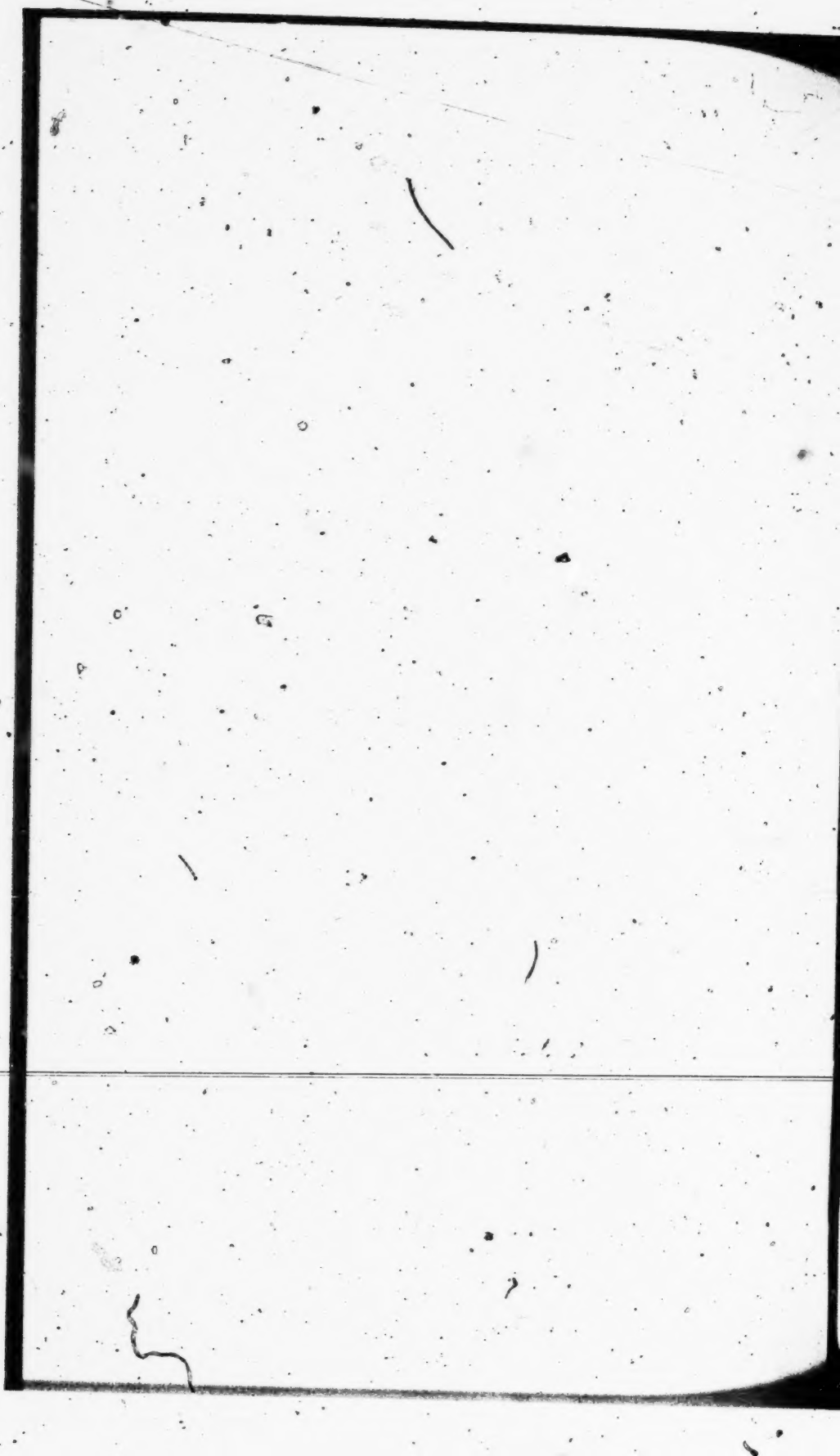

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

STATEMENT OF MATTER INVOLVED.

The important question here involved is as to the meaning of the term *"any party in interest,"* as the same is used in Paragraph (20) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Paragraph 20) the paragraph providing that any railroad construction, operation or abandonment contrary to its provisions or the provisions of Paragraph (18) of the same section "may be enjoined by any Court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or *any party in interest*" (emphasis ours).

We contend that the opinion of the Circuit Court of Appeals in this matter (R. pp. 316 to 322)* clearly so limits such term as to exclude any party who is not possessed of an independent legal right of his own which will be invaded by the threatened construction, with the result that the statutory provision for the maintenance of an injunction suit by "any party in interest" to prevent railroad construction in violation of said Paragraphs (18) and (20) would be rendered ineffective for any purpose, and the object Congress had in mind in including "any party in interest" among those at whose suit such forbidden construction could be enjoined, would be entirely frustrated.

Further, we contend that the uncontroverted facts clearly show that petitioner (plaintiff below) was at the time of the institution of this action in the Dis-

*NOTE. For convenient reference this opinion is inserted as an appendix to our brief in support of petition, included under this cover.

trict Court and thenceforth to the entry of the final decree, a "party in interest" as to the proposed unlawful construction by respondent (defendant below), under any reasonable construction of the term "any party in interest."

The action here involved was commenced in the District Court of the United States for the Southern Division of the Northern District of California, by your petitioner, as a party in interest under the provisions of said Paragraph (20), to enjoin the construction by respondent, a common carrier in interstate and intrastate commerce, of an extension of its line of railroad in San Mateo County, California, without first having secured from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing such construction, as required by said Paragraphs (18) and (20).

In the District Court issue was joined upon the question whether the proposed construction by defendant, respondent here, would constitute an extension of its line of railroad within the meaning of that term as used in said Paragraph (18), and upon the question whether plaintiff (petitioner here) was a party in interest within the meaning of that term as used in said Paragraph (20), and so entitled to institute this injunction proceeding.

By consent of the parties the cause was referred to William H. Hunt, Esq., as Special Master, "to take the testimony and report his findings of fact and conclusions of law" to the Court (R. 31, 32).

A full hearing was had before the Special Master, who by consent of the parties also personally examined the territory involved (R. 287). His Report, including his findings of fact and conclusions of law in favor of petitioner upon both said issues, was filed in the District Court December 28, 1929 (R. 35-45, incl.). Exceptions to the Report were filed by the defendant (respondent here).

On January 31, 1930, the District Court, Judge Frank H. Kerrigan presiding, confirmed the Report, adopting the Special Master's findings of fact and conclusions of law as those of the Court (R. 58).

On February 28, 1930, final decree was entered perpetually enjoining defendant from constructing as proposed "unless and until there has first been obtained from the Interstate Commerce Commission of the United States its certificate that the present or future public convenience or necessity requires or will require the construction of such extension" (R. 61-75, incl.).

On appeal by defendant from this decree, the Circuit Court of Appeals, on February 9, 1931, reversed the decree of the District Court solely upon the ground that the plaintiff, petitioner here, was not at the commencement of the action or at any time thereafter, up to the entry of the final decree, a "party in interest" within the meaning of that term as used in said Paragraph (20) (Opinion, R. 316 to 322). The Circuit Court of Appeals declined to decide the question "whether the line contemplated by the applicant is a spur or industrial track, wholly within a state and

within the exclusive jurisdiction of the State Commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission" (Opinion, R. 316, 322).

Plaintiff's petition for rehearing was denied by the Circuit Court of Appeals on March 16, 1931 (R. 324).

It can not be questioned that the decision of the Circuit Court of Appeals holds that, *notwithstanding the construction proposed by respondent would constitute* (as found by the Special Master and the Trial Court) *an extension of its line of railroad within the meaning of said Paragraphs (18) and (20)*, your petitioner was without right to maintain an action to enjoin, for the reason that it was not a "party in interest" within the meaning of said Paragraph (20), and such decision must be so interpreted in determining whether the same is erroneous, as is contended by your petitioner.

The facts material to petitioner's claim that it was at the date of the institution of this action and thenceforth to the entry of final decree therein, a "party in interest" within the meaning of that term as used in said paragraph (20), are uncontroverted.

Petitioner, a subsidiary of The Western Pacific Railroad Company, was incorporated July 10, 1928, under the laws of the State of California, for the purpose, among others, of constructing and operating a line of railroad extending from San Francisco, California, southerly to Redwood City in San Mateo County, California, and thence to a connection with

the railroad of The Western Pacific Railroad Company at or near Niles, Alameda County, California (Plff. Ex. 17, R. 277).

On July 16, 1928, it filed with the Interstate Commerce Commission its application for the necessary certificate of public convenience and necessity for the first unit of said proposed line, viz., that portion between San Francisco and Redwood City (R. 85).

Respondent Southern Pacific Company, an interstate common carrier by railroad, the route of whose existing double track main line of railroad between San Francisco and Los Angeles, California (R. 197, 198), was westerly of and nearly parallel with the proposed route of petitioner between South San Francisco and Redwood City, and in the vicinity of and at the point of respondent's own proposed construction approximately 3700 feet westerly from petitioner's route (R. 38), intervened as a "party in interest" in the Interstate Commerce Commission proceeding of petitioner, in opposition to petitioner's application (R. 39).

Hearing on the application was had in San Francisco in January, 1929, and respondent participated therein. An examiner's report recommending denial of the application was thereafter made, but upon application of petitioner the proceeding was reopened over the objection of Southern Pacific Company, respondent here (R. 286), and an amended application to construct the whole line from San Francisco to Niles (in no way affecting the original location of the route of the proposed line in San Mateo County)

was filed. At the date of the institution of petitioner's action and at all times thereafter to the entry of the final decree, petitioner's proceeding before the Commission was pending undetermined (Opinion, Circuit Court of Appeals). To avoid any suggestion that this action may have become moot by reason of unfavorable action of the Commission subsequent to the final injunction decree herein, we assume to state, as is intimated by the opinion of the Circuit Court of Appeals, that petitioner's proceeding before the Commission was finally determined by the granting of petitioner's application, pending decision by the Circuit Court of Appeals.

The territory involved in this proceeding which is proposed to be served by petitioner, being principally the territory lying easterly of its proposed line and bordering on the Bay of San Francisco (R. 38, 39), is in large part available for industrial use and desirable for industrial projects, and, according to the findings, "is new territory, which has not heretofore been served by the defendant railroad" (respondent here) (R. 39).

Very shortly after the San Francisco hearing on petitioner's application to the Commission, viz., on March 23, 1929, respondent, without having presented to the Commission any application for the necessary certificate of public convenience and necessity therefor, and under the circumstances and in the manner stated in Findings 10, 11 and 12 (R. 40, 41), commenced the construction of its proposed extension to cross petitioner's proposed line, and to be approxi-

mately 8200 feet in length, and designed "to serve an unlimited territory extending to the Bay of San Francisco" (Finding 11, R. 40), being the same territory proposed to be served by petitioner.

It was also found by the Special Master that the purpose of respondent was and is to connect its partially constructed track at its westerly end with its existing line, and to extend it at the easterly end, northerly and southerly and approximately parallel with the proposed railroad of petitioner (R. 42).

Admittedly, respondent has never asked for or obtained any certificate of public convenience and necessity for the construction or operation of its proposed extension.

Petitioner contended before the Circuit Court of Appeals and here contends that upon these facts it manifestly had at the date of the commencement of the injunction action and thenceforth to the date of entry of the final decree therein, an ever present interest in maintaining the *status quo* as against any railroad construction by another railroad carrier into its proposed territory in violation of said Paragraphs (18) and (20), pending final determination of its own application with regard thereto, sufficient to make it a "party in interest" within the meaning of said Paragraph (20)..

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI HEREBY PETITIONED FOR.

1. The Circuit Court of Appeals of the Ninth Circuit has by its decision in this action decided an important question of federal law in a way probably in conflict with applicable decisions of this Court, viz., *whether a plaintiff suing as a "party in interest" under said Paragraph (20) solely to enjoin a railroad extension in violation of said Paragraphs (18) and (20) must be possessed of an independent legal right of his own which will be invaded by the threatened construction, which is a requisite to the maintenance by a plaintiff in his own right of the ordinary equitable action for an injunction.*

We submit that the opinion of the Circuit Court of Appeals answers this question in the affirmative.

We contend that there is no decision of this Court sustaining such conclusion, and that the same is in conflict with the decision of this Court in *Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company* (referred to hereinafter and in the supporting brief as the *Texas & Pacific* case), 270 U. S. 266, 70 L. ed. 578, wherein railroad construction without a certificate was enjoined pursuant to Paragraph (20) at the instance of a plaintiff who had no independent legal right of its own to protect and would not suffer any legal injury by reason of the threatened Santa Fe construction, the only injury threatened to plaintiff being a possible diversion of traffic by a competitor by means of the proposed unauthorized and therefore unlawful construction; and also in conflict with the decisions of this Court

in such cases as *Alexander Sprunt & Son, Inc., et al. v. United States,* 281 U. S. 249, 74 L. ed. 832, and *Edward Hines Yellow Pine Trustees, et al. v. United States,* 263 U. S. 143, 68 L. ed. 216.

2. The Circuit Court of Appeals, by its decision that petitioner is not a "party in interest" (with relation to the proposed construction of respondent), within the meaning of said Paragraph (20), has decided an important question of federal law in a way probably in conflict with applicable decisions of this Court, such not only as the *Texas & Pacific* case, supra, but also such cases as *Alexander Sprunt & Son, Inc. et al. v. United States,* supra, and *Edward Hines Yellow Pine Trustees, et al. v. United States,* supra, as well as in conflict with the purposes of Congress in including "any party in interest" among those who may maintain the action authorized by said Paragraph (20).

3. If this Court does not agree with this petitioner's position that the decisions of this Court specified in 1 and 2 above are applicable to petitioner's situation under the facts of this case, the Circuit Court of Appeals by its decision herein has decided an important question of federal law without precedent, which has not been but should in the public interest be settled by this Court.

4. The decision of the Circuit Court of Appeals as to the construction to be given to the term "any party in interest" as used in said Paragraph (20) would render ineffective for any purpose whatever the provision in said paragraph for the maintenance by "any party in interest" of an injunction suit to prevent

such railroad construction as is expressly prohibited by said Paragraphs (18) and (20).

We respectfully submit that petitioner's reasons for the allowance of the writ of certiorari hereby sought require the issuance of such writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 6226, Southern Pacific Company, a corporation, Appellant, vs. Western Pacific California Railroad Company, a corporation, Appellee; and that the judgment of said Circuit Court of Appeals therein be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
April 15, 1931.

Respectfully submitted,
F. M. ANGELLOTTI,
H. P. TYLER,
Attorneys for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

TABLE OF DATES.

July 10, 1928	Incorporation of Western Pacific California Railroad Company (R. 277, Ex. 17).
July 11, 1928	Resolution adopted by Directors of Western Pacific California Railroad Company directing application to Interstate Commerce Commission for authorization to construct line of railroad from San Francisco to Redwood City, San Mateo County, California (R. 36).
July 16, 1928	Petitioner's application filed with Interstate Commerce Commission (R. 85).
January, 1929	First hearing on application, San Francisco, participated in by Southern Pacific Company, intervener, as a party in interest (R. 39).
March 23, 1929	Commencement of construction of extension by Southern Pacific Company (R. 40).
March 27, 1929	This suit begun (Bill for Injunction).
March 27, 1929	Order to show cause and temporary restraining order granted.
April 5, 1929	Amended complaint for Injunction filed (R. 1-12).
April 26, 1929	Temporary Injunction granted (R. 30-32).
April 26, 1929	Wm. H. Hunt, Esq. appointed Special Master to take testimony and make report (R. 31, 32).
December 28, 1929	Final report and findings of Special Master filed (R. 45).
January 31, 1930	Confirmation by Judge of District Court of Special Master's report and findings in favor of plaintiff (R. 58).
February 28, 1930	Final decree filed (R. 61-75).
February 9, 1931	Judgment of Circuit Court of Appeals reversing judgment of District Court (R. 323).
March 16, 1931	Order denying rehearing (R. 323, 324).

II.

OPINIONS AND JUDGMENTS OF THE COURTS BELOW.

The judgment of the trial Court was entered February 28, 1930 (R. 61-75).

The opinion of the Circuit Court of Appeals herein was rendered and filed on February 9, 1931. It is contained in the Transcript of Record herein at pages 316 to 322, inclusive, and is also appended to this supporting brief. It is published in the Advance Sheets, Vol. 46 (2d), Federal Reporter, pages 729 to 731, inclusive.

Judgment of the Appellate Court (Circuit Court of Appeals) was entered February 9, 1931 (R. 323).

Petitioner's petition to the Circuit Court of Appeals for a rehearing was denied March 16, 1931 (R. 323-324).

III.

JURISDICTION.

This case involves the interpretation and application of Paragraphs (18), (19), (20) and (22) of Section 1 of the Interstate Commerce Act (49 U. S. C. A., Section 1, Paragraphs (18), (19), (20), (22)).

The jurisdiction of this Court herein is conferred by Judicial Code, Section 240, Subdivision (a) (28 U. S. C. A., Section 347, Subdivision (a)).

IV.

STATEMENT OF THE CASE.

The material facts concerning this controversy are contained in the Statement of Matter Involved in the accompanying petition (supra, pp. 2 to 8).

V.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding, in effect, that a plaintiff suing as a "party in interest" under said Paragraph (20) solely to enjoin railroad construction in violation of Paragraphs (18) and (20) of the Interstate Commerce Act must be possessed of an independent legal right of his own which will be invaded by the threatened construction.

2. The Circuit Court of Appeals erred in holding that petitioner here was not a "party in interest," within the meaning of said Paragraph (20), as to the proposed unlawful construction by respondent.

VI.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved in this action are Paragraphs (18), (19), (20), and (22), of Section 1 of the Interstate Commerce Act (see U. S. Code, Ann., Title 49, Section 1, Paragraphs (18), (19), (20), and (22)), contained in the Transportation Act of 1920. These paragraphs are as follows, viz.:

Paragraph (18). "After ninety days after this paragraph takes effect *no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof,* or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line of railroad,* and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment" (emphasis ours).

Paragraph (19). "The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the Governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall

also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates."

Paragraph (20). "The commission shall have power to issue such certificate as prayed for or to refuse to issue it, or to issue it for a portion or portions of a line of railroad or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. *From and after issuance of such certificate, and not before, the carrier by railroad may,* without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and *proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of Paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest;* and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of Paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both" (emphasis ours).

Paragraph (22). "The authority of the Commission conferred by Paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

VII.

ARGUMENT.

1. DETERMINATION OF THE QUESTION WHETHER A PLAINTIFF SUING UNDER PARAGRAPH (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT TO ENJOIN RAILROAD CONSTRUCTION IN VIOLATION OF PARAGRAPHS (18) AND (20) OF SAID SECTION 1 IS A "PARTY IN INTEREST" WITHIN THE MEANING OF SAID PARAGRAPH (20) IS IN NO WAY DEPENDENT ON HIS BEING POSSESSED OF SOME INDEPENDENT LEGAL RIGHT OF HIS OWN WHICH WILL BE INVADED BY THE THREATENED CONSTRUCTION.

(a) Decision of Circuit Court Herein is Based Solely on Ground that Plaintiff Did Not Possess Requisite to Maintenance of Ordinary Injunction Action, Thereby Ignoring Intent of Congress in Enacting Paragraphs (18) to (20) Inclusive of Section 1 of Interstate Commerce Act.

The opinion of the Circuit Court of Appeals which reversed the decision of the District Court on one ground only, viz., that plaintiff (petitioner here) was not a "party in interest" within the meaning of Paragraph (20), on its face discloses that the only reason for such decision was that the plaintiff did not possess an independent legal right of its own which would be invaded by the proposed construction.

The authorities cited and quoted from by the Court in support of its conclusion that "under these authorities and many others that might be cited it was error to grant a permanent injunction on the facts before the Court" (Opinion, Appendix and R. 321), were authorities citing and following the well established equitable principle admittedly applicable in the ordinary injunction suit brought by a plaintiff in his own right to protect against threatened injury, requiring that such plaintiff, in order to institute and maintain such action for equitable injunctive relief, have some existing independent legal right of his own the invasion of which is threatened by the act sought to be enjoined. Petitioner does not dispute the correctness of the principles stated in the decisions cited by the Court as applied to the actions concerned therein (ordinary equitable injunction suits) but contends that such decisions and the principles enunciated have no application whatever to the statutory injunction action afforded by said Paragraph (20), and that such cases cannot in any degree assist in interpreting and applying the term "any party in interest" as used in said paragraph. In such a statutory suit the question is simply whether a plaintiff therein is a "party in interest" with relation to the construction proposed to be enjoined, construing Paragraph (20) in connection with Paragraphs (18) to (22) inclusive of Section 1 of the Interstate Commerce Act in the light of the legislative purpose in authorizing injunction to prevent violations of said provisions. We have set forth these statutes on pages 16, 17 and 18 of this brief. The purpose of Congress

in the enactment of these provisions in the year 1920 was stated by this Court in the *Texas & Pacific* case, supra, (270 U. S. 277-279). As was said in said decision by this Court:

> "A truer guide to the meaning of the terms extension and industrial track as used in Paragraphs 18 to 22 is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. * * * (Citing cases)."

It was in pursuance of this purpose that the prohibition of railway extensions without authorization from the Interstate Commerce Commission was enacted.

We find in said Paragraph (18) an absolute prohibition of any extension by any carrier of its line of railroad unless and until authorization of the Interstate Commerce Commission shall first have been obtained therefor, evidenced by a certificate of public

convenience and necessity. This prohibition is repeated in Paragraph (20) where it is provided that,

> "from and after issuance of such certificate, and not before, the carrier by railroad * * * may proceed with the construction * * * covered thereby."

All that follows in said Paragraph (20) has to do with the matter of enforcing compliance by railroad carriers with the provisions of Paragraph (18) and of the sentence just above quoted from Paragraph (20), and the enforcement methods adopted were, *first,* authorizing the maintenance of statutory injunction suit for the purpose of preventing construction in violation thereof, and, *second,* declaring construction by any carrier in violation thereof a crime punishable by severe penalties.

(b) Statutory Injunction Under Paragraph (20), Solely to Prohibit Railroad Construction in Violation Thereof, Has Nothing in Common With Ordinary Equitable Injunction Action by Party to Protect a Threatened Independent Legal Right of His Own.

It is to be noted that the injunction to be obtained under said Paragraph (20) at the suit of the United States, the Interstate Commerce Commission, an appropriate state commission, or "any party in interest," *is effective only to prohibit railroad construction "contrary to the provisions of" these statutes;* in other words, such an injunction merely prohibits acts violative of a federal law. It does not purport to protect any right of the party plaintiff, whether that plaintiff be the United States, a governmental commission or board, or a "party in interest," all of

which are by the terms of said Paragraph (20) placed in the same category with regard to the right to maintain such a suit. Whatever benefit a "party in interest" plaintiff may obtain thereunder is solely such benefit as will incidentally result from the defendant being prevented by injunction from violating this law. The primary purpose of the injunction provision was to enforce compliance by carriers with the requirements of said Paragraphs (18) and (20). In the instant case the injunction granted was one merely enjoining the extension by respondent of its line of railroad as proposed, *"unless and until there has first been obtained from the Interstate Commerce Commission the necessary certificate of public convenience and necessity therefor,"* and if and when respondent obtains such a certificate the injunction will no longer be effective for any purpose. It seems clear that a proceeding for an injunction of this character has nothing in common with the ordinary injunction proceeding wherein a party seeks protection of some independent legal right of his own, and the well settled rules as to the qualifications requisite to the institution and maintenance of the latter proceeding are, we submit, entirely foreign to the question here involved.

(c) Conclusion that Statutory Authorization Under Paragraph (20) to "Party in Interest" to Enjoin Unlawful Construction is Available Only to Party Having Independent Legal Right of His Own, Would Render Such Statutory Authorization to a Party in Interest Unnecessary and Pure Surplusage, and Violate Well Settled Rules of Statutory Construction; and is in Conflict With This Court's Applicable Decision in the Texas & Pacific Case, and Inconsistent With This Court's Decisions in the Chicago Junction and Sprunt Cases, etc.

It is further to be noted that the term "any party in interest" as used in said Paragraph (20) cannot reasonably be held to denote only such a party as has an independent legal right of his own which will be invaded by the proposed unlawful construction. Such a one, under well settled legal principles, could initiate and maintain his action in his own right *without any statutory authorization whatever,* for the relief essential to the protection of such right, by way of injunction or otherwise. To give so limited a construction to Paragraph (20) as to hold, as we submit the Circuit Court of Appeals did, that it was designed solely to give protection to rights already fully protected by substantive law, would violate well settled rules of statutory construction. Illustration of the situation with regard to parties having independent legal rights of their own is to be found in the case of *Baltimore & Ohio R. R. Co., et al. v. United States,* 264 U. S. 258, 68 L. ed. 667, familiarly known as the *"Chicago Junction Case,"* in which the plaintiff carriers were seeking a decree vacating an order of the Interstate Commerce Commission made under Paragraph (2) of Section 5 of the Interstate Commerce Act, authorizing acquisition by the New York Central of certain Chicago terminal railways. *There was no*

statutory authorization available to the plaintiffs for the maintenance of their action. This Court, however, holding that the loss threatened was "not the incident of more effective competition" but was "injury inflicted by denying to the plaintiffs equality of treatment" (68 L. ed. 675), a right to which they were entitled under the law (idem), held the plaintiffs entitled to maintain their action, notwithstanding absence of statutory authorization, for the reason, as stated in its subsequent decision in *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249, 74 L. ed. 832, 838, "that an independent legal right of the plaintiff was affected by the order which it was sought to set aside." There was some difference of opinion between the members of this Court in the *Chicago Junction* case as to whether or not any independent legal right of the plaintiffs was actually involved, but there was no disagreement with regard to the acknowledged right of one having such an independent legal right to maintain his action for all necessary protection thereof without any statutory authorization therefor. In the instant case we have an express statutory authorization for the maintenance of the injunction suit by "any party in interest," which is wholly unnecessary and pure surplusage if the views expressed by the Circuit Court of Appeals in this case as to the meaning of the term "any party in interest" are correct. It must be presumed that Congress, in inserting this provision for an injunction suit by "any party in interest," had in mind other parties than those already afforded full protection by substantive law.

If it be essential to the maintenance by "any party in interest" of the injunction suit authorized by said Paragraph (20) that such party be possessed of an independent legal right of his own which will be invaded by the threatened action of the defendant, as, we submit, is declared by the opinion of the Circuit Court of Appeals in this case and constitutes the sole basis of its decision, it necessarily follows that the plaintiff in the *Texas & Pacific* case, supra, was not qualified to maintain that action for the reason that it had no independent legal right of its own, invasion of which was threatened by the proposed extension of the defendant. The opinion of this Court therein shows that the only injury threatened by the proposed extension of the Santa Fe into its territory was the coming in of a competitor for traffic and the probable loss of business by reason of the presence of such a competitor.

(d) Threatened Loss of a Competitive Advantage is Not, as to the Party Threatened With Loss, a Legal Actionable Wrong, But Constitutes the Invaded Party a "Party in Interest" Within Paragraph (20) and the Only Remedy for the Invaded Party is Afforded by Paragraph (20), Which Remedy is Both Affirmative and Complete Under Applicable Decisions of This Court.

It was fully recognized by the opinion of this Court in *Baltimore & Ohio R. R. Co., et al. v. The United States,* supra, that loss of traffic by a railroad carrier due to competition was not such an injury to such carrier as would be violative of any of such carrier's independent legal rights (supra page 24). It is obvious, we think, that no railroad carrier can be held to have, as against a possible competitor, any legal

right or title to the traffic of any of the territory served by it. Prior to the enactment of Paragraphs (18) to (22) of Section 1 of the Interstate Commerce Act, railroad carriers were at liberty to construct extensions wherever they saw fit, utterly regardless of whether they thereby occupied territory already served by other carriers, with consequent loss of traffic to such other carriers when they did thus establish themselves in territory served by such other carriers. In such cases the carrier whose territory was invaded was as absolutely without protection as is the grocery store keeper whose field of operations is invaded by another grocery store keeper establishing a store in the same neighborhood, for the reason that such a carrier had nothing *in the nature of a legal right* as against a possible competitor for the traffic of the territory served by it, nothing upon which an application in its own right for an injunction to prevent competition could be founded. As we have seen, one of the principal objects of said Paragraphs (18) to (22) was, in the interest of the public as a whole in maintaining an adequate railroad system throughout the United States, to prevent such a weakening of a railroad already serving particular territory, except upon a finding by the Interstate Commerce Commission that considerations of public convenience and necessity require the new line, made upon due application and investigation, and after a hearing at which all interested parties may appear.

That a railroad carrier has nothing in the nature of a legal right as against an existing or possible competitor for the traffic of the territory served by it, has

been recently expressly held by a "three judge court" in *Pennsylvania R. Co. v. United States,* 40 F. (2d) 921, 924, 925, a decision as to which certiorari was not applied for by the Pennsylvania Railroad Company. That company was attempting to maintain an action to vacate an order of the Interstate Commerce Commission authorizing another railroad carrier to extend its line into territory then exclusively served by the Pennsylvania. The only threatened injury to the Pennsylvania by reason of the proposed construction of the new company was the *loss of traffic* that would, in all probability, be suffered by the coming in of this competitor for such traffic. The Court held that while the Pennsylvania "undoubtedly had such an interest in the application for the extension as entitled it to intervene and be heard" in the proceeding before the Commission, "such interest alone did not give it a right to maintain an independent suit *to set aside the Commission's order," for the reason that no legal right of its own was violated by the order.* There was no statutory authorization for the institution of such an independent suit by a "party in interest." In the absence of statutory authorization for such suit by a "party in interest" to annul an order of the Interstate Commerce Commission, it was incumbent upon the Pennsylvania to show that the order assailed violated some legal right of its own. As to the want of legal right in the Pennsylvania, the Court said:

> "True the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the

traffic flowing into and out of that busy district. *But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted unless it be found somewhere in the law, written or unwritten.* Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law, the Transportation Act of 1920, does not explicitly or implicity accord a noncompetitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service * * *. *Where, as here, the showing is lawfully made and the Commission has validly acted, the carrier at whose expense the change is wrought has no legal right invaded and has suffered no legal injury"* (emphasis ours).

We respectfully submit that the correctness of these views cannot be disputed.

In the *Texas & Pacific* case, supra, the situation of plaintiff was precisely that of the Pennsylvania in the case just above discussed; it clearly had no present *legal right of its own* to protect and the coming in of the Santa Fe as a competitor for its business *could inflict no legal injury upon it.* Since the only injury threatened plaintiff therein by the proposed extension of the Santa Fe was the coming in of a competitor and the probable loss of business by reason of the presence of such competitor, it is quite clear that the

Texas & Pacific Railway Company could not have successfully maintained its action against the Gulf, Colorado & Santa Fe Railway Company except for the express statutory authorization given by Paragraph (20) to any "party in interest." We respectfully submit that the application to the plaintiff in the *Texas & Pacific* case of the test prescribed by the opinion herein, would have precluded the granting of the injunction sought and obtained by the Texas & Pacific Railway Company.

While opposing counsel in the *Texas & Pacific* case, although ably and ingeniously raising numerous objections to the action and the relief sought, apparently did not object to the institution and maintenance of the suit on the ground that the plaintiff therein was not a "party in interest" within the meaning of Paragraph (20) (presumably recognizing the clear statutory right of the plaintiff to maintain the same), jurisdiction of the action was entertained by this Court and the facts material to the institution and maintenance of the action were before this Court and actually set forth in the opinion therein. Under these circumstances, this Court, replying to an objection that the plaintiff had not first sought relief at the hands of the Interstate Commerce Commission, said of the plaintiff therein:

> "But a party in interest who is opposed to the construction is not authorized by the act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear therein in opposition. *If no such application has been made*

Paragraph (20) affords him the only remedy. That remedy is both affimative and complete." The *Texas & Pacific* case, supra (at page 273, 270 U. S. Reports), (emphasis ours).

In other words, that remedy gives such a carrier all that it is entitled to under the law, viz., the prevention of any extension by a competing railroad that may prejudicially affect it, until, upon due application and hearing, at which it may appear and be heard in opposition, the Interstate Commerce Commission has granted the requisite certificate of public convenience and necessity. It is very clear that the views expressed in the opinion of the Circuit Court of Appeals herein eliminate from the category of "any party in interest," as that term is used in said Paragraph (20), any railroad carrier in the situation of the Texas & Pacific at the time it instituted and maintained to final decree the injunction proceeding involved in the *Texas & Pacific* case, supra, and any such carrier would be without any remedy whatever as against an extension undertaken by a competing carrier into its territory, with no opportunity afforded it to have the question of the propriety of such extension determined by the Interstate Commerce Commission in the light of such objections as it might make thereto on the ground of want of public necessity therefor.

The term "any party in interest" as used in legislation relative to the Interstate Commerce Commission was involved in *Alexander Sprunt & Son, Inc., et al. v. United States*, 281 U. S. 249, 74 L. ed. 832, and *Edward Hines Yellow Pine Trustees, et al. v. United*

States, et al., 263 U. S. 143, 68 L. ed. 216. Each of these cases was an action brought by shippers to annul an order of the Interstate Commerce Commission.

In the *Sprunt* case the shippers were deprived by the Commission's order "of a competitive advantage" but "were not subjected to or threatened with any legal wrong." There was no statutory authorization *for the institution of any suit by a party in interest to vacate such an order.* It was held by this Court with regard to these parties that by reason of their competitive advantage under the old rate they had "a distinct interest in the proceeding before the Commission." This Court therein said (281 U. S. 249, 254, 255):

> "The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under paragraph 3 of the Interstate Commerce Act. For their competitive advantage was threatened. Having this interest they were entitled to intervene in that administrative proceeding. And if they did so they became entitled under paragraph 212 of the Judicial Code to intervene as of right in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order."

It is plain from what is said that if there had been a statute authorizing suit by "any party in interest," as there is in Paragraph (20), this Court would have

held that these shippers, as such parties in interest, were entitled to institute and maintain such suit to annul the order assailed. The importance of this decision in the instant case is not only because the meaning given therein by this Court to the term "any party in interest" as used by Congress in an analogous statute (Section 212, Judicial Code, now Sections 44 and 45 (a) of Title 28, U. S. C. A., Supplement 1929 thereto) was with regard to proceedings before the Interstate Commerce Commission, referred to in the above quotation, where the term used was "and any party or parties in interest to the proceeding before the Commission," but also because such meaning is utterly opposed to the meaning attributed to the term by the Circuit Court of Appeals herein.

In the *Sprunt* case the Court said (U. S. Rep. 143, 147 and 148):

> "Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Yellow Pine Trustees v. United States*, 263 U. S. 143, 147, 148."

We respectfully submit that the views expressed by the Circuit Court of Appeals in its opinion herein are at variance with the views expressed by this Court in its decision in these two cases.

It would seem that the true meaning of the term "any party in interest" contained in said Paragraph (20) is a matter of great public importance, and that the views of the Circuit Court of Appeals with regard thereto, as stated in its opinion, are of such a nature that they should not be allowed to become the estab-

lished law in the United States or in any circuit thereof without full consideration and decision to that effect by this Court. We respectfully submit that the views of the Circuit Court of Appeals with regard thereto, to the effect that such a "party in interest" must have some independent legal right of his own which will be invaded by the threatened extension, cannot be sustained.

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2. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER HERE WAS NOT A "PARTY IN INTEREST" WITHIN THE MEANING OF SAID PARAGRAPH (20) WITH RELATION TO THE PROPOSED UNAUTHORIZED EXTENSION OF RESPONDENT.

(a) Carrier Plaintiff Represents Public as Well as Private Interests.

Incidentally involved here, though not substantially material, we believe, to a determination of this question, is the question whether petitioner suing under Paragraph (20) represents the public as well as private interests. This question was presented to this Court in the *Texas & Pacific* case, supra, wherein the District Court had overruled a plea of laches interposed by the defendant as not supported in fact, and also "on the ground that a plaintiff suing under Paragraph (20) represents the public as well as private interests, and that, hence, a plaintiff's laches cannot operate as a bar." This Court said:

> "We need not determine whether the latter ground is sound; for the facts do not warrant a finding of laches" (*Texas & Pacific* case, supra, 70 L. ed. 584).

We have found no other decision of this Court in which this particular question is referred to, and while, as said above, we do not deem its determination substantially material to our claim that petitioner was a "party in interest" within the meaning of Paragraph (20), it is a question that might well be of substantial importance in any proceeding instituted by one as a "party in interest" under Paragraph (20) to enjoin a prohibited extension, and, we respectfully submit, should be determined by this Honorable Court.

With regard to this question we have, at this time, simply to suggest one or two considerations with regard to the purpose of the injunction provision in that paragraph, the character of the action and the relief to be obtained thereunder.

We submit that it is clear that the primary purpose of Congress in enacting the injunction provision was to insure compliance by carriers with the requirements of said Paragraphs (18) and (20), by providing a method by which they could be enjoined from violating the provisions contained therein. Congress in enacting this provision can hardly be assumed to have been primarily concerned with the matter of protection of private parties. In Paragraph (20) the "party in interest" is grouped with other possible parties, in each case a public body, whose exclusive purpose in bringing any such proceeding would necessarily be the protection of public interests, and the relief that could be obtained at the suit of a "party in interest" is exactly the same as that to be obtained

by the United States or by any governmental tribunal specified therein, viz., enforced compliance with the law as specified in Paragraphs (18) and (20). It would seem that under such circumstances the plaintiff "party in interest," whatever may be his private interest, necessarily represents public interests, as well as his own private interests. It may fairly be inferred that Congress, in including "any party in interest" among those designated as parties plaintiff for such a suit, felt that such a party would have a special interest in seeking to prevent a threatened violation of law which might prejudicially affect it, and that, by reason thereof, whenever its interest seemed to it to justify such action, it would institute and maintain such suit to prevent the threatened violation of law. It may well have been recognized that such a party would be more alert in seeking to prevent any particular unlawful construction thought to be prejudicial to its own interests than would the United States or any commission, and that by enabling such a party to maintain an injunction proceeding against a violator of the law, enforcement of the law would be facilitated.

It is hardly necessary to point out the importance of the party in interest to the plan of Congress to effectuate compliance by carriers with the provisions of said Paragraphs (18) and (20), designed, as was said by this Court in the recent case of *Chesapeake & Ohio Ry. Co. v. United States, et al.*, 75 L. ed., Advance Sheets 445, "in the interest of the public, to prevent improvident and unnecessary expenditures

for the construction and operation of lines not needed to insure adequate service."

On the ground, with opportunity to know of any proposed violation disadvantageous to him and naturally disposed to immediately take all steps necessary to adequately protect his interests, he is perforce an additional guardian of the public interests in seeing that any construction in violation of law is stopped. The Interstate Commerce Commission with its manifold nation-wide duties, however efficient and zealous it may be, cannot police the whole country. And there is no special interest to spur any State Body to action in such cases.

We believe we do not exaggerate when we say that the "party in interest" is the most important cog in the machinery provided by Congress in so far as the injunctive remedy is concerned. By limiting the term "any party in interest" in the way the learned Circuit Court of Appeals has done, we submit that, for all practical purposes, such party has been entirely eliminated, and substantially the whole purpose of his express inclusion as a proper party plaintiff by Congress has been frustrated.

(b) Situation of Petitioner Under Circumstances of This Case Made it an Interested Party as to Respondent's Unauthorized Construction.

The words "any party in interest," are words of broad scope, and taken simply as they read would clearly include any one who has any "interest" having relation to the threatened action sought to be enjoined. There is nothing in the connection in which

they are here used to limit such meaning. In fact, considering the purpose of the enactment of these provisions of law (said Paragraphs (18), (19), 20)) such meaning is emphasized rather than limited. Congress was obviously seeking assurance of the enforcement of the prohibitions contained in those paragraphs. These considerations compel a construction of the term which would include all who, *by reason of their then situation, have a real and legitimate concern in the threatened violation of law, and may be disadvantaged by such violation.* It is to be noted that the statute does not attempt to measure the extent, amount or character of the interest required in a plaintiff. It is enough that the party has an "interest" having relation to the threatened extension sought to be enjoined.

The opinion of this Court in *Alexander Sprunt & Sons, Inc. v. United States,* supra, appears to give full support to these views.

We respectfully submit that under the views expressed in that case, petitioner was a "party in interest" with relation to the proposed construction by respondent. If we divorce ourselves from the idea that the term "any party in interest" as used in said Paragraph (20), denotes solely a party having some independent legal right of his own which is being invaded, as we submit we must do in view of the considerations to which we have referred, this would seem clear. We have in our petition at pages 5 to 8 inclusive set forth the material facts in this respect. Briefly, the picture presented thereby is as follows:

Seeking to enter new territory not in fact served by any railroad carrier, petitioner proceeds in a lawful manner to make application to acquire the essential authorization from the Interstate Commerce Commission. Opposed by respondent, the contest is a protracted one. While such contest is pending, respondent, still opposing petitioner's application and without filing any application for a certificate authorizing extension of its own railroad into such territory, proceeds to actually construct an extension of its own railroad into such territory. Manifestly the presence of another railroad in such territory will be of great disadvantage to petitioner in the matter of traffic, if it constructs its own railroad therein. Manifestly, too, if respondent had applied to the Interstate Commerce Commission for the necessary certificate, petitioner, because of its own pending application, would have been entitled to intervene in respondent's proceeding as a "party in interest" therein, and in the two pending proceedings (petitioner's and respondent's) it would have been determined by the Commission what "the present or future public convenience and necessity" required in the matter of railroad construction in that territory, i. e., whether one or the other or both of these carriers should construct their respective lines of railroad into such territory. There is no way by which that question can be determined by the Commission except upon an application by respondent for the necessary certificate (*Texas & Pacific* case, supra, 70 L. ed. 582), and respondent here failed to make any such application and has proceeded with actual construction in violation of the statute

expressly prohibiting such action, thus attempting to avoid determination of the question whether its extension is, under the circumstances, warranted by considerations of public convenience and necessity, a matter in which petitioner is, by reason of its own pending application, vitally concerned.

Does it not seem clear that, in such a situation, petitioner had a present "interest" in maintaining the *status quo* as against any unlawful extension by another carrier into its proposed territory, pending determination of its own application with regard thereto, and that it was therefore, at the commencement of its suit, and thenceforth to final decree, a "party in interest" with relation to such proposed extension, within the meaning of said Paragraph (20)? It is obvious that in the absence of this injunctive remedy, petitioner would have found upon the granting of its application, that the territory to be traversed by its own line was already occupied by an extension of the railroad of its principal competitor for business, which would very materially alter the situation existing at the time of the institution of its own proceeding for the necessary certificate of public convenience and necessity.

In this connection, attention is respectfully called to the memorandum opinion of the trial judge in granting the temporary injunction herein, which is contained in the record (pp. 32 to 35) in which the interest of petitioner with regard to the proposed extension of respondent is concisely set forth.

The fact that at the time of the initiation of this suit and thenceforth to the time of final decree in the

District Court, it was possible that petitioner's application for a certificate of public convenience and necessity might be finally denied, cannot detract from petitioner's interest. By duly making its application to the appropriate lawful tribunal for a certificate it put itself into a position under the law where it had the right to oppose, by all lawful means, the entry of another carrier into the territory proposed to be served by it. That it could intervene in opposition, in any proceeding before the Commission initiated by another carrier for authorization to extend its line into such territory cannot be doubted. It would seem that it certainly had such an interest in fact with relation to any extension of another carrier's line into the same territory as to warrant its being classed as a "party in interest" with regard thereto, with full capacity as such under said Paragraph (20) to institute and maintain this action, brought solely to enjoin construction by respondent of an *unlawful extension* to serve the same territory. Notwithstanding the granting of petitioner's application by the Commission while defendant's appeal to the Circuit Court herein was under submission and not yet decided, thus removing the last obstacle to construction by applicant of its proposed line, the necessity of the continuance in force of the injunction granted by the final decree herein prohibiting construction by defendant into the territory proposed to be served by petitioner, without an adjudication by the Interstate Commerce Commission that public convenience and necessity justified such extension, is at least as great as it was prior to the receipt by petitioner of its certificate from the Commission.

3. RESPONDENT'S PROPOSED CONSTRUCTION WOULD HAVE CONSTITUTED AN EXTENSION OF ITS LINE OF RAILROAD WITHIN THE MEANING OF SAID PARAGRAPH (18).

In so far as our petition for a writ of certiorari is concerned, we refer to this matter here simply for the purpose of stating that the findings of the Special Master with regard thereto, confirmed and adopted by the trial judge, were in petitioner's favor in all respects; and that upon the particular question whether respondent's new trackage would constitute a "spur" as distinguished from an extension, every point made by learned counsel for respondent is answered by what was said by this Court in its opinion in the *Texas & Pacific* case, supra, 270 U. S. 266.

CONCLUSION.

We believe the question decided by the opinion of the learned Circuit Court of Appeals herein to be of such general importance as to merit the consideration of this Honorable Court. The importance of the question from the national standpoint lies in the fact that if the term "any party in interest" contained in said Paragraph (20) be restricted to the extent required by the opinion of the Circuit Court of Appeals, it will seriously impair, if indeed it does not destroy, the intended efficacy of the injunctive remedy in favor of "any party in interest" provided by said Paragraph (20). This remedy was deemed essential by Congress to insure compliance with the provisions enacted by it in the matter of railroad extensions (said Paragraphs (18) and (20)), in further-

ance of its policy of developing and maintaining an adequate railway system for the people of the United States.

We respectfully submit that the case is one calling for the exercise by this Court of its supervisory powers, and to that end, a writ of certiorari should be granted as prayed.

Dated, San Francisco, California,
April 15, 1931.

Respectfully submitted,

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(Appendix Follows.)

Appendix

Opinion United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6226

Southern Pacific Company (a corporation), *Appellant,*

vs.

Western Pacific California Railroad Company (a corporation), *Appellee.*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before: Rudkin and Wilbur, Circuit JJ., and Norcross, District J.,

Per curiam:

July 10, 1928, the Western Pacific California Railroad Company was organized as a corporation under the laws of the State of California for the purpose, among others, of constructing and operating a standard gauge line of railroad commencing at a point in the City and County of San Francisco and extending thence in a general southerly direction to and beyond

Redwood City, in San Mateo County, California, the purpose of the construction being to enable the company to carry freight and other traffic for hire as a common carrier from and to points on the line of the proposed road between its termini. The Western Pacific Company applied to the Interstate commerce Commission for a certificate of necessity authorizing the construction of the road, as required by the Transportation Act of 1920 (49 U. S. C. A. Sec. 1, Par. 18), and that application was still pending at the time of the final hearing in the court below.

The Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and has for many years last past operated as owner, or lessee, a line of railroad extending from the City of San Francisco in a southerly direction to and beyond Redwood City, California. The latter company is also a common carrier organized for the purpose of transporting persons and property in interstate and intrastate commerce for hire. The existing line of the Southern Pacific parallels the proposed line of the Western Pacific throughout its entire length, the two lines being approximately one-half mile apart. On March 23, 1929, the Southern Pacific Company commenced the construction of a railroad track, or spur, across the proposed line of the Western Pacific at a point near the limits of the City of San Mateo. This proposed line is to be about 8200 feet in length and will extend from the main line in an easterly direction towards San Francisco Bay.

Paragraph 18 of Section 1, *supra,* provides that no carrier subject to the act shall undertake the exten-

sion of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under the act, over or by means of such additional line of railroad, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line. Paragraph 20 of the same section provides that any construction or operation contrary to the provisions of Paragraph 18 may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest. Paragraph 22 of the same section provides that the authority conferred on the Commission by paragraph 18 shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The present suit was instituted by the Western Pacific Company against the Southern Pacific Company to enjoin the construction of the contemplated track by the Southern Pacific on the ground that the latter company had not obtained a certificate of necessity from the Interstate Commerce Commission, as required by paragraph 18, *supra*. From a final decree granting a permanent injunction, the Southern Pacific

Company has appealed. Two questions are presented for consideration. First, is the Western Pacific Company a party in interest within the meaning of paragraph 20, and second, is the 8200-ft. track contemplated by the appellant an extension within the meaning of paragraph 18, or is it a spur or industrial track within the meaning of paragraph 22?

As appears from the foregoing statement, the appellee has been organized as a corporation, has projected a line of railroad and has applied to the Interstate Commerce Commission for a certificate of necessity. On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant from building a spur track, or extending its line, as the case may be. Such showing will not, in our opinion, support or justify an injunction such as was granted here.

> "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending, and threatened so as to be averted only by the protecting preventive process of injunction." Truly v. Wanzer, 5 How, 140, 142.

> "The complainant must establish a clear legal right, not doubtful, nor uncertain, and the injury threatened must be of a permanent and irrepara-

ble character. Where the complainant's title is doubtful, equity will not relieve by injunction. * * * It is the duty of the court when an injunction bill has been filed to inquire and ascertain whether the individual or corporation seeking the relief has a clear legal right to the use, occupation, or enjoyment of the property or right, the invasion of which is sought to be enjoined. These are elementary principles in a proceeding in equity. The complainant must rely on the strength of his own title, or other legal right, and not on the weakness of the title or legal right asserted by the respondent."

Again:

"The appellant is seeking equitable relief, and has the burden of establishing a clear legal title to the use and occupation of the streets and the possession of the rights of way in dispute. It has failed to show that it has any valid or existing ordinance giving it the right to the use of the streets in question, nor has it proven title to the disputed rights of way, and it necessarily follows that the clear legal right necessary to sustain this proceeding has not been established." Myersdale & S. St. Ry. Co. v. Pennsylvania & M. St. Ry. Co., 69 Atl. 92, 94, 95.

"An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action, or to prevent the perpetration of an act prohibited by statute in favor of one who urges as his only ground for relief the diminution of the profits of a trade or business pursued by complainant in common with others.

> "Where complainant's right is doubtful or his title is in dispute, a perpetual injunction cannot be obtained until the doubt is removed by a proper proceeding and the right made certain, the only proper relief which may be granted in such cases being a temporary injunction maintaining the status quo until the right or title in question is established. A permanent injunction should not be awarded except in a clear case and to prevent irreparable injury." 32 C. J. 35, 36.

Under these authorities and many others that might be cited, it was error to grant a permanent injunction on the facts before the Court. Had the application of the appellee for a certificate of necessity been finally denied by the Interstate Commerce Commission before the suit was instituted, or before final decree, the error would seem apparent, because in that event the appellant would have been restrained from constructing a spur track, or extending its line, at the suit of an utter stranger without the slightest interest in the pending controversy. Had the application been denied pending the appeal the error would seem equally apparent; and the fact that the application has since been granted, if such be the fact, does not change the nature of the appellee's right or title at the time the final decree was entered. For this error, the decree must be reversed.

In view of this conclusion, we deem it unnecessary, if not improper, to consider the doubtful and perplexing question whether the line contemplated by the appellant is a spur or industrial track, wholly within a state and within the exclusive jurisdiction

of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission.

Reversed and remanded.

(Endorsed): Opinion filed Feb. 9, 1931,

Paul P. O'Brien, Clerk.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent.

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to Review a Judgment Reversing a Judgment of a District Court for the Northern District of California.

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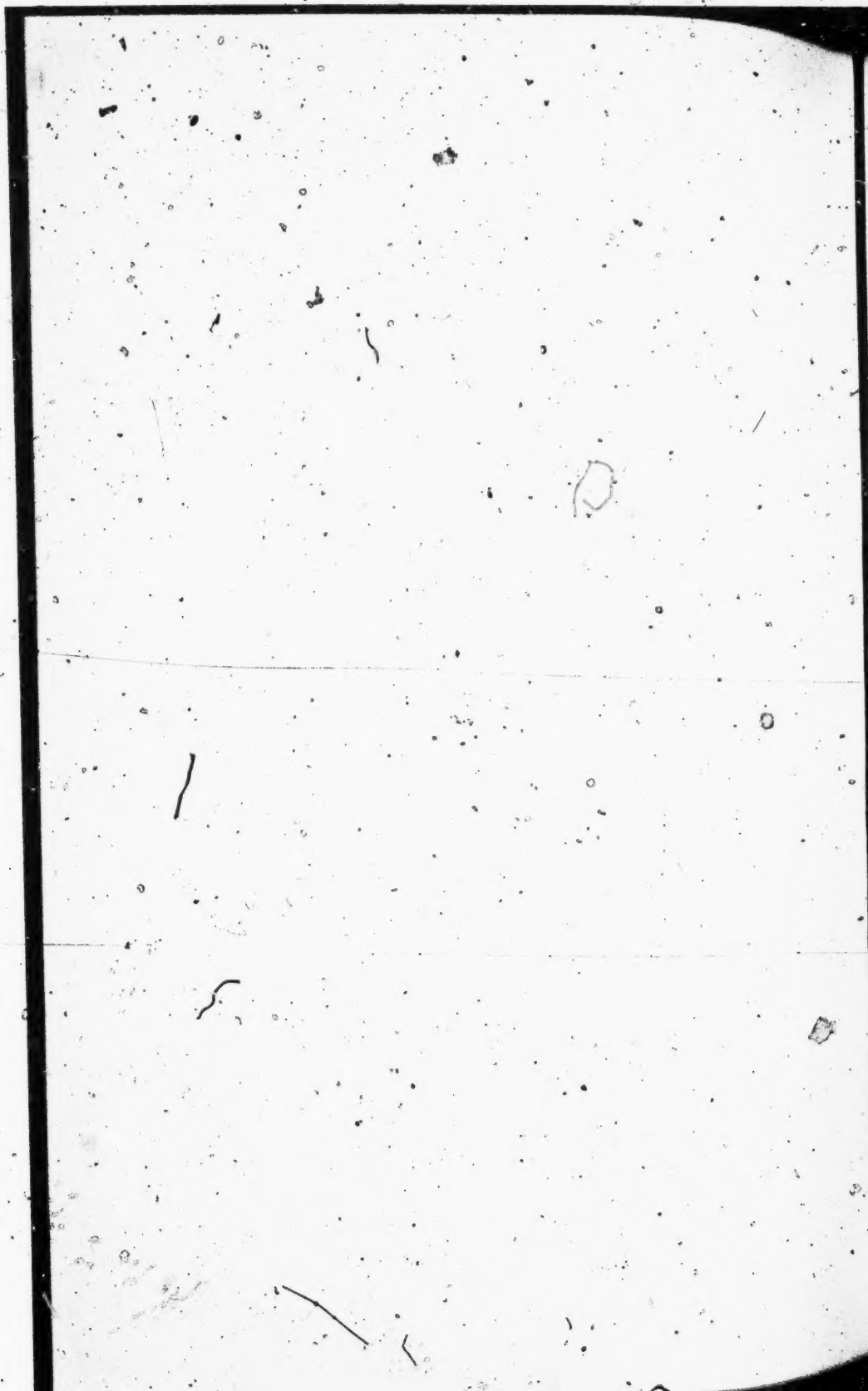

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In the Supreme Court
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OCTOBER TERM, 1931

No. 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent.

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to Review a Judgment Reversing a Judgment of a District Court for the Northern District of California.

This case is before this Honorable Court on writ of certiorari to the United States Circuit Court of Appeals of the Ninth Circuit, to review a judgment of that Court reversing a judgment of a District Court for the Northern District of California, which granted an injunction prohibiting respondent from construct-

ing an extension of its line of railroad in San Mateo County, California, without first procuring from the Interstate Commerce Commission a certificate of public convenience and necessity therefor, as required by Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1, Pars. (18), and (20)).

OPINIONS OF COURTS BELOW.

The official report of the opinion delivered in the Circuit Court of Appeals is to be found in the Transcript of Record herein, presented with the petition for a writ of certiorari, at pages 316 to 322, inclusive. A copy thereof is appended to the supporting brief presented with the petition for the writ of certiorari herein, and the opinion is published in the advance sheets of volume 46 F. (2d), pages 729 to 731, inclusive.

There was no opinion delivered in the District Court in the final disposition of this case, but the report of the Special Master, including his findings of fact and conclusions, are to be found in the Transcript of Record herein, pages 35 to 45, and the final decree of the District Court granting the injunction prayed for is to be found in said Transcript of Record, pages 61 to 75.

In the District Court a memorandum opinion was filed by the trial judge in granting a temporary injunction herein, which is contained in the record (R. 32-35).

JURISDICTION.

This case involves the interpretation and application of Paragraphs (18), (19), (20) and (22) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Section 1, Pars. (18), (19), (20) and (22)), contained in the Transportation Act of 1920. The jurisdiction of this Court herein is conferred by Judicial Code, Section 240, Sub. (a) (28 U. S. C. A., Section 347, Sub. (a)).

These statutes are set out in the appendix to this brief.

The judgment or decree of the Circuit Court of Appeals to be reviewed herein was given and made February 9, 1931 (R. 323). The order of said Court denying petitioner's petition for a rehearing therein was made March 16, 1931 (R. 323, 324). Petitioner's petition to this Court for a writ of certiorari was filed in this Court April 20, 1931, and the order of this Court granting said petition was made May 25, 1931.

The judgment or decree of the District Court was given and made on February 28, 1930, and is to be found in the Transcript of Record at pages 61 to 75. Defendant (respondent here) appealed from said judgment or decree to the Circuit Court of Appeals of the Ninth Circuit, May 26, 1930 (R. 292, 293).

The action here involved was commenced in the District Court of the United States for the Southern Division of the Northern District of California, by your petitioner as a party in interest under the provisions of said Paragraph (20), to enjoin the construction by respondent, a common carrier in interstate and

intrastate commerce, of an extension of its line of railroad in San Mateo County, California, without first having secured from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing such construction, as required by said Paragraphs (18) and (20).

In the District Court issue was joined upon the question whether the proposed construction by defendant (respondent here), would constitute an extension of its line of railroad within the meaning of that term as used in said Paragraph (18), and upon the question whether plaintiff (petitioner here) was a party in interest within the meaning of that term as used in said Paragraph (20), and so entitled to institute this injunction proceeding.

By consent of the parties the cause was referred to William H. Hunt, Esq., as Special Master, "to take the testimony and report the findings of fact and conclusions of law" to the Court (R. 31, 32).

A full hearing was had before the Special Master, who by consent of the parties also personally examined the territory involved (R. 287). His report, including his findings of fact and conclusions of law in favor of petitioner upon both said issues, was filed in the District Court December 28, 1929 (R. 35-45, incl.). Exceptions to the report were filed by the defendant (respondent here).

On January 31, 1930, the District Court, Judge Frank H. Kerrigan presiding, confirmed the report, adopting the Special Master's findings of fact and conclusions of law as those of the Court (R. 58).

On February 28, 1930, final decree was entered perpetually enjoining defendant from constructing as proposed "unless and until there has first been obtained from the Interstate Commerce Commission of the United States its certificate that the present or future public convenience or necessity requires or will require the construction of such extension" (R. 61-75, incl.).

On appeal by defendant from this decree, the Circuit Court of Appeals, on February 9, 1931, reversed the decree of the District Court solely upon the ground that the plaintiff (petitioner here), was not at the commencement of the action or at any time thereafter, up to the entry of the final decree, a "party in interest" within the meaning of that term as used in said Paragraph (20) (Opinion, R. 316 to 322). The Circuit Court of Appeals declined to decide the question "whether the line contemplated by the appellant is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission" (Opinion, R. 316, 322).

CLAIM OF PETITIONER.

It is the claim of petitioner that the Circuit Court of Appeals erred in holding that petitioner was not, at the time of instituting this action and thenceforth to entry of final decree herein, a "party in interest" within the meaning of said Paragraph (20), and as

such fully entitled to maintain the action, under the express authorization conferred by said Paragraph (20) on "any party in interest"; and its reversal of the judgment of the District Court on that ground is expressly assigned as error requiring reversal of the judgment of the Circuit Court of Appeals.

It is further claimed by petitioner that the judgment of the District Court upon the issue whether the proposed construction by respondent would constitute an "extension" of its line of railroad within the meaning of that term as used in said Paragraph (20) finds full support in the findings and conclusions of the Special Master, confirmed and approved by the District Court, and that said findings and conclusions find full and sufficient support in the evidence, and that the Circuit Court of Appeals erred in not so holding, and in not affirming said judgment *in toto*, and its failure so to do is expressly assigned as error.

ARGUMENT.

I.

PETITIONER, AT THE TIME OF THE INSTITUTION OF THIS ACTION AND AT ALL TIMES SUBSEQUENT THERETO, WAS A "PARTY IN INTEREST" WITHIN THE MEANING OF PARAGRAPH (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT, AND AS SUCH WAS ENTITLED TO MAINTAIN THIS ACTION.

1. Statement of Facts Material to Petitioner's Claim that it is a "Party in Interest".

The facts material to petitioner's claim that it was at the date of the institution of this action and thenceforth to the entry of final decree herein a "party in interest" within the meaning of that term as used in

said Paragraph (20) are uncontroverted, and are as follows:

Petitioner, a subsidiary of The Western Pacific Railroad Company, was incorporated under the laws of the State of California for the purpose, among others, of constructing and operating a line of railroad extending from San Francisco, California, southerly to Redwood City in San Mateo County, California, and thence to a connection with the railroad of The Western Pacific Railroad Company at or near Niles, Alameda County, California (Plff. Ex. 17, R. 277).

On July 16, 1928, it filed with the Interstate Commerce Commission its application for the necessary certificate of public convenience and necessity for the first unit of said proposed line, viz., that portion between San Francisco and Redwood City (R. 85).

Respondent Southern Pacific Company, an interstate common carrier by railroad, the route of whose existing double track main line of railroad between San Francisco and Los Angeles, California (R. 197, 198), was westerly of and nearly parallel with the proposed route of petitioner between South San Francisco and Redwood City, and in the vicinity of and at the point of respondent's own proposed construction approximately 3700 feet westerly from petitioner's route (R. 38), intervened as a "party in interest" in the Interstate Commerce Commission proceeding of petitioner, in opposition to petitioner's application (R. 39).

Hearing on the application was had in San Francisco in January, 1929, and respondent participated

therein. An examiner's report recommending denial of the application was thereafter made, but upon application of petitioner the proceeding was reopened over the objection of respondent (R. 286), and an amended application to construct the whole line from San Francisco to Niles (in no way altering or otherwise affecting the original location of the route of the proposed line in San Mateo County) was filed. At the date of the institution of petitioner's action and at all times thereafter to the entry of the final decree, petitioner's proceeding before the Commission was pending undetermined (Opinion, Circuit Court of Appeals). To avoid any suggestion that this action may have become moot by reason of unfavorable action of the Commission subsequent to the final injunction decree herein, we assume to state, as is intimated by the opinion of the Circuit Court of Appeals, that petitioner's proceeding before the Commission was finally determined by the granting of petitioner's application, prior to decision in this proceeding by the Circuit Court of Appeals.

The territory involved in this proceeding which is proposed to be served by petitioner, being principally the territory lying easterly of its proposed line and bordering on the Bay of San Francisco (R. 38, 39), is in large part available for industrial use and is desirable for industrial projects, and, according to the findings, "is new territory, which has not heretofore been served by the defendant railroad" (respondent here) (R. 39).

Very shortly after the San Francisco hearing on petitioner's application to the Commission, viz., on

March 23, 1929, respondent, without having presented to the Commission any application for the necessary certificate of public convenience and necessity therefor, and under the circumstances and in the manner stated in findings 10, 11 and 12 (R. 40, 41), commenced the construction of an extension to cross petitioner's proposed line, and to be approximately 8200 feet in length, and designed "to serve an unlimited territory extending to the bay of San Francisco" (Finding 11, R. 40), being the same territory proposed to be served by petitioner.

The purpose of respondent (as found by the Special Master) was and is to connect its partially constructed track at its westerly end with its existing line, and to extend it at the easterly end, northerly and southerly and approximately parallel with the proposed railroad of petitioner (R. 42).

Admittedly, respondent has never asked for or obtained any certificate of public convenience and necessity from the Interstate Commerce Commission for the construction or operation of its proposed extension.

Petitioner contended before the Circuit Court of Appeals, and here contends, that upon these facts it manifestly had, at the date of the commencement of the injunction action and thenceforth to the date of entry of the final decree therein, an ever present interest in maintaining the *status quo* as against any railroad construction by another railroad carrier in violation of Paragraphs (18) and (20), into territory which it proposed to serve by a railroad it proposed to construct, and application for certificate to con-

struct which by it was pending undetermined with the Interstate Commerce Commission, sufficient to make it a "party in interest" within the meaning of said Paragraph (20).

2. Meaning of Term "Any Party in Interest" as Used in Said Paragraph (20).

(a) The Circuit Court of Appeals Herein Erred in Adopting Meaning of Term "Any Party in Interest" Contended for by Respondent.

Paragraph (20) (set forth in Appendix) contains the following provision:

> "*Any construction,* operation, or abandonment *contrary to the provisions of this paragraph* or of paragraph (18) or (19) of this section *may be enjoined* by any court of competent jurisdiction *at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest;* * * *" (emphasis ours).

What is necessary to constitute one a "party in interest" within the meaning of this paragraph?

In answering this question the learned Circuit Court of Appeals adopted the contention of counsel for respondent to the effect that since Paragraph (20) does not define "party in interest," such a party "must possess those qualifications requisite to enable a party to maintain a suit in equity for an injunction" (p. 4 of Respondent's Reply Brief to Petitioner's Brief on Application to this Court for Writ of Certiorari), and, applying the well settled rules applicable in the ordinary injunction suit brought by a plaintiff in his own right to protect against threatened irreparable injury, held that one could not be a "party

in interest" within the meaning of the paragraph unless he was possessed of some existing *independent legal right of his own*, the invasion of which is threatened by the act sought to be enjoined.

In our brief in support of our petition for certiorari herein, we set forth at length our reasons (pages 18 to 33) for our claim that this theory of the Circuit Court of Appeals is erroneous and that the qualifications essential to a plaintiff maintaining an action in his own right to protect himself from threatened irreparable injury, under the well settled principles applicable in the ordinary injunction action, are utterly inapplicable to the plaintiff in the statutory injunction action afforded by said Paragraph (20) to "any party in interest" to enjoin construction of a railroad extension by a railroad carrier which has not procured the necessary certificate of public convenience and necessity therefor from the Interstate Commerce Commission, as required by said Paragraphs (18) and (20). In view of this showing in such brief, we shall here discuss that matter as briefly as we can, referring only to the reasons why such a construction of the term "any party in interest" is manifestly opposed to the whole purpose of the statute involved.

Whether one is a "party in interest" within the meaning of said Paragraph (20) must necessarily depend upon whether he is a "party in interest" *with relation to the extension proposed to be enjoined*, construing Paragraph (20) in connection with Paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act in the light of the legislative

purpose in authorizing injunction to prevent violation of said provisions.

In discussing the meaning of the terms "extension" and "industrial track" as used in these sections, this Court said in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Railway Co.* (hereinafter referred to as the *Texas & Pacific* case), 270 U. S. 266, 70 L. ed. 578, at page 583:

> "A truer guide to the meaning of the terms extension and industrial track, as used in Paragraphs (18) to (22) is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920."

This Court then proceeded to state such policy. (See page 20, Petitioner's Brief in Support of Petition for Writ of Certiorari). The same is obviously true of the term "any party in interest" in Paragraph (20).

In pursuance of this policy, Paragraphs (18) and (20) contain an absolute prohibition of any extension unless and until authorization of the Interstate Commerce Commission shall first have been obtained therefor, evidenced by a certificate of public convenience and necessity.

Paragraph (20) has also to do with the matter of enforcing compliance by railroad carriers with the provisions of Paragraph (18) and the permission in Paragraph (20) "From and after issuance of such certificate, and not before, the carrier by railroad may, * * * proceed with the construction * * * covered thereby."

(b) The Injunction Provided by Paragraph (20) is Effective Solely to Prohibit Construction Contrary to Statutory Prohibition, and Does Not Protect or Purport to Protect Any Legal Right of a Plaintiff.

The injunction provided thereby is effective only to prohibit construction contrary to the provisions of these statutes, and does not purport to protect any legal right of the party plaintiff, whether that plaintiff be the United States, a governmental commission or board, or a "party in interest", all of whom are placed in the same category with regard to the right to maintain such a suit. Whatever benefit a "party in interest" plaintiff may obtain thereunder is solely such benefit as will incidentally result from the defendant *being prevented by injunction from violating these statutory provisions,* and the primary purpose of the injunction provision was to enforce compliance by carriers with such provision, by prohibiting the same "unless and until there has first been obtained from the Interstate Commerce Commission" the necessary certificate of public convenience and necessity therefor (R. 75).

(c) The Legislative Act in Conferring Upon Any "Party in Interest" the Right to Institute Injunction Action to Prevent Prohibited Construction, Would be Pure Surplusage Under the Meaning Attributed to Such Term by the Circuit Court of Appeals Herein and Respondent.

To give the term "any party in interest" the meaning attributed to it by the Circuit Court of Appeals and learned counsel for respondent herein, viz., that it includes only those who have some independent legal right of their own, which is threatened to their irreparable injury by the proposed extension, would make it pure surplusage.

Illustration of this is to be found in *Baltimore & Ohio R. R. Co. et al. v. United States,* 264 U. S. 258, 68 L. ed. 667, familiarly known as the "*Chicago Junction* case"; *there was no statutory authorization available to the plaintiffs therein for the maintenance of their action* to vacate and set aside an order of the Interstate Commerce Commission, but the plaintiffs were nevertheless held entitled to maintain their action for the reason, as expressly stated by the Court in its subsequent decision in *Alexander Sprunt & Son, Inc. v. United States,* 281 U. S. 249, 74 L. Ed. 832, 838, "that an independent legal right of the plaintiff was affected by the order which it was sought to set aside."

A party having an independent legal right of his own may protect it by injunction where necessary, *without any statutory authorization.*

In the instant case we are dealing with a statute which expressly confers the right to maintain this action upon "any party in interest". As to parties having independent legal rights of their own, such conferring of statutory authority would be wholly unnecessary and pure surplusage, for they could maintain their action regardless thereof. It must be presumed that Congress, in inserting this provision for an injunction suit by "any party in interest", had in mind other parties than those already afforded full protection of their legal rights by substantive law.

(d) No Party Has an Independent Legal Right of its Own With Reference to the Threatened Loss of a Competitive Advantage.

Threatened loss of a competitive advantage is not, as to the party threatened with loss, a legal actionable

loss, and *such party has no independent legal right of its own with reference thereto,* and therefore, under the construction of the term "any party in interest" given by the Circuit Court of Appeals herein, could not, as an interested party, maintain the statutory action authorized by Paragraph (20).

We take it that it will not be questioned that loss of traffic by a railroad carrier due to mere competition is not such an injury to such carrier as is violative of any of such carrier's independent legal rights. This was fully recognized in the *Chicago Junction* case, and we are of opinion that this view has never been seriously questioned.

In the case of *Alexander Sprunt & Son, Inc. v. United States, supra,* it was expressly held that one possessing simply a competitive advantage had no such right as entitled it to maintain an independent suit to set aside an order of the Interstate Commerce Commission, this Court saying (74 L. ed. 837):

> "The enjoyment of this advantage *gave them a distinct interest in the proceeding before the Commission* * * *. *For their competitive advantage was threatened* * * *. But that interest alone did not give them the right to maintain an independent suit to vacate and set aside the order. Such a suit can be brought by a shipper *only where a right of his own* is alleged to have been violated by the order" (emphasis ours).

(NOTE: *It should be noted here that in that case there was no statutory authorization for such a suit by any party in interest.*)

In the *Texas & Pacific* case, *supra,* the only injury threatened was *loss of a competitive advantage. No independent legal right of the Texas & Pacific was involved.* It was recognized throughout that proceeding, instituted under Paragraph (20) to obtain an injunction prohibiting construction of an extension by a rival carrier without the certificate required by Paragraphs (18) and (20), *that it was a "party in interest" with relation to the proposed extension.* This Court, replying to an objection that plaintiff should first have sought relief at the hands of the Interstate Commerce Commission, said:

> "But a *party in interest* who is opposed to the construction is not authorized by the act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear therein in opposition. *If no such application has been made Paragraph (20) affords him the only remedy. That remedy is both affirmative and complete"* (70 L. ed. at page 582) (emphasis ours).

It is to be noted that this Court was here speaking of a carrier as to which the only loss threatened was *deprival of a competitive advantage,* and which was *possessed of no independent legal right of its own.*

The construction herein by the Circuit Court of Appeals of the term "any party in interest" would have prevented not only the Texas & Pacific Railway Company from maintaining its action, but also every other railroad carrier whose only basis of complaint is that the proposed construction threatens competition *based on no requirement of public convenience*

and necessity which would be injurious to it and result in harm to the public. One cannot read the statement of this Court in the *Texas & Pacific* case, *supra* (70 L. ed. at page 584), set forth on page 20 of our brief in support of our petition for writ of certiorari, without realizing that railroad carriers threatened with competition by the proposed construction of another railroad carrier constituted a class which in the opinion of Congress required protection against unauthorized construction, and that the Congressional intent in using the term "any party in interest" was in part to afford to such a carrier what this Court, as noted above, said was its "only remedy" against construction undertaken without a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

The Texas & Pacific Railway Company could *not* have maintained its injunction action under the views expressed by the Circuit Court of Appeals in this case. It seems clear that this Court considered it a "party in interest" within the meaning of the statute.

(c) The Legislation in Question Utterly Fails to Support an Interpretation of the Term "Party in Interest" as Including Only Parties Having Independent Legal Rights of Their Own to Protect, Capable of Being Enforced in Equity, but the Legislation Connotes the Contrary.

There is absolutely nothing in this legislation upon which to reasonably base a conclusion that the term "party in interest" as used therein was intended to include only those having independent legal rights of their own capable of being enforced in equity. As used here, the term really connotes the contrary.

Under the terms of this statute, the proceeding authorized is absolutely devoid of the issues incident to actions in equity, and does not afford the relief to be obtained in such an action; aside from an issue as to whether the plaintiff is a "party in interest" within the meaning of the statute, but one issue is material in such a proceeding, viz., is the defendant proceeding to construct an extension of its railroad without having first procured the required certificate of public convenience and necessity from the Interstate Commerce Commission. If the answer be "yes", the decree enjoining such construction pending the obtaining of such certificate must follow. The sum total of the relief granted by the statutory decree is the enjoining of construction *expressly prohibited by law.* Whatever this statutory action under Paragraph (20) may be styled, as to being in equity or otherwise, it is obvious that, in fact, it possesses none of the characteristics of an action in equity in either issues or relief to be obtained, with the single exception that the relief is to be in the form of the limited injunction prescribed as above stated, one granted solely to prevent violation of an express statutory prohibition enacted by Congress.

(f) The Term "Any Party in Interest" as Used in an Analogous Statute Has Already Been Defined by this Court Contrary to the Opinion of the Circuit Court of Appeals Herein and Respondent's Contention, Which Definition and Construction are Applicable to and Controlling Upon the Meaning of Said Term in Paragraph (20).

This Court has already defined the term "any party in interest" as used in an analogous statute (Sec. 212 Judicial Code, now Secs. 44 and 45 (a) of Title 28,

U. S. C. A. Supp. 1929 thereto) in *Alexander Sprunt & Son, Inc. et al. v. United States, supra* (see page 15, *supra*).

In that case parties whose *only basis of complaint was that their competitive advantage was threatened* by an order of the Commission were attempting to maintain an action to annul the order, and were held, in the language quoted on page 15, *supra,* to have a *distinct interest* in the proceeding before the Interstate Commerce Commission, for the sole reason that *"their competitive advantage* was threatened", and were entitled under said Sec. 212 Judicial Code, as *"parties in interest"* to *intervene* as of right in any suit wherein is involved the validity of the order of the Commission.

It is plain from what was said by the Court in that case that if the statute had authorized the *maintenance* of an independent suit by any such "party in interest", *as Paragraph (20) here does authorize,* this Court would necessarily have held that these shippers, as such shippers, were entitled to institute and maintain the action there under consideration. It did expressly hold that the shippers therein, who had no independent legal right of their own, were "parties in interest" within the meaning of that term as used in said Sec. 212 of the Judicial Code, and entitled to all the remedies afforded by that section to "parties in interest".

We do not understand that learned counsel for respondent contend that Congress had not the *power* to confer the authority to maintain in a Federal Court the suit specified in Paragraph (20) upon a party

having no independent legal right of its own, although their detached quotation from *Cates v. Allen,* 37 L. ed. 804, 149 U. S. 451, 458, on page 4 of their reply brief herein, *might* so imply. The syllabus of that decision, 37 L. ed. 804, correctly sets forth the principle declared, as follows:

> "Equitable relief in aid of demands cognizable in the courts of the United States only on their law side cannot be sought in the same action, although allowable in the state courts by virtue of state legislation."

The Court was here considering a *state* statute purporting to give a right to an enforceable lien on property on facts not sufficient to create such or any lien under the federal practice, and a divided Court held this right, valid enough in the state courts, could not be enforced in a *federal* Court. The quotation of counsel for respondent certainly does not go to the extent of declaring a principle to the effect that Congress *could not* empower federal Courts to entertain an action by a party situate as is petitioner here, for the relief prescribed by Paragraph (20) of Section 1 of the Interstate Commerce Act, and one would be at a loss to find any rule of law sustaining such a declaration.

Nor is there any authority cited by respondent to sustain its proposition that because Paragraph (20) does not itself expressly define the term "any party in interest", such a person must be one who possesses the qualifications requisite to enable a party to maintain the ordinary suit in equity for an injunction.

With the exception of actions to *annul or vacate orders of the Interstate Commerce Commission, as to all of which there was no statutory authorization for the maintenance of an independent action by a party in interest,* the other cases relied on by respondent are simply the ordinary actions in equity for an injunction.

3. Upon the Material Facts, Petitioner Was at the Time of the Commencement of this Action and Thenceforth to Final Decree, a "Party in Interest" Within the Meaning of Said Paragraph (20).

If we divorce ourselves from the idea that the term "any party in interest" as used in said Paragraph (20) denotes solely a party having some independent legal right of its own which is being invaded, as we submit we must do in view of the considerations to which we have referred, it seems clear that the facts herein are such as to establish very clearly that petitioner comes within that term.

The words "any party in interest" are words of broad scope and taken simply as they read would clearly include anyone who has any "interest" having relation to the threatened action sought to be enjoined. There is nothing in the connection in which they are here used to limit such meaning. In fact, considering the purpose of the enactment of these provisions of law (said Paragraphs (18), (19) and (20)) such meaning is emphasized rather than limited. Congress was obviously seeking assurance of the enforcement of the prohibitions contained therein. These considerations compel a construction of the term which would include all who, by reason of their then situa-

tion, *have a real and legitimate concern in the threatened violation of law, and may be disadvantaged by such violation.* It is to be noted that the statute does not attempt *to measure the extent, amount or character of the interest required* in a plaintiff. It is enough that the party has an "interest" having relation to the threatened extension sought to be enjoined. If any limitation of any character had been intended it would have been inserted, as was done in Section 16 of the Clayton Act with relation to injunctive relief against threatened loss or damage by a violation of the Anti-trust laws, the right to sue for and have injunctive relief being declared to exist "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings".

We have herein at pages 6 to 10, inclusive, set forth the material facts in this respect.

The picture presented thereby is substantially as follows:

Seeking to enter new territory not in fact served by any railroad carrier, petitioner proceeds in a lawful manner to make application to acquire the necessary authorization from the Interstate Commerce Commission. Opposed by respondent, the contest is a protracted one. While such contest is pending, respondent, still opposing petitioner's application and without filing any application for a certificate authorizing extension of its own railroad into such territory, proceeds to actually construct an extension of its own railroad into such territory. Manifestly the

presence of another railroad in such territory will be of great disadvantage to petitioner in the matter of traffic, if it constructs its own railroad therein. Manifestly, too, if respondent had applied to the Interstate Commerce Commission for the necessary certificate, petitioner, because of its own pending application, *would have been entitled to intervene in respondent's proceeding as a "party in interest" therein,* and in the two pending proceedings (petitioner's and respondent's) it would have been determined by the Commission what "the present or future public convenience and necessity" required in the matter of railroad construction in that territory, i. e., whether one or the other or both of these carriers should construct their respective lines of railroad into such territory. *There is no way by which that question can be determined by the Commission except upon an application by respondent for the necessary certificate* (*Texas & Pacific* case, *supra*), and respondent here failed to make any such application and has proceeded with actual construction in violation of the statute expressly prohibiting such action, thus attempting to avoid determination of the question whether its extension is, under the circumstances, warranted by considerations of public convenience and necessity, a matter in which petitioner is, *by reason of its own pending application,* vitally concerned.

Does it not seem clear that, in such a situation, petitioner had a present "interest" in maintaining the status quo as against any unlawful extension by another carrier into its proposed territory, pending determination of its own application with regard thereto,

and that it was therefore, at the commencement of its suit, and thenceforth to final decree, a "party in interest" with relation to such proposed extension, within the meaning of said Paragraph (20). It is obvious that, without this injunctive remedy, petitioner would have found upon the granting of its application, that the territory to be traversed by its own line was already occupied by an extension of the railroad of its principal competitor for business, very materially altering the situation existing at the commencement of its own proceeding for the necessary certificate of public convenience and necessity.

The fact that at the time of the initiation of this suit and thenceforth to the time of final decree in the District Court, it was possible that petitioner's application for a certificate of public convenience and necessity might be finally denied, cannot detract from petitioner's interest. By duly making its application to the appropriate lawful tribunal for a certificate it put itself into a position under the law where it had the right to oppose, by all lawful means, the unlawful entry of another carrier into the territory proposed to be served by it. That it could, *as a party in interest, intervene in opposition in any proceeding before the Commission initiated by another carrier for authorization to extend its line into such territory, cannot be doubted.* Having such right of intervention and being denied the exercise thereof by the failure of respondent to seek a certificate from the Commission, petitioner assuredly had such an interest in fact with relation to an extension of respondent's line into the same territory as to warrant its being classed as a

"party in interest" with regard thereto, and possessed full capacity as such under said Paragraph (20) to institute and maintain this action, brought solely to enjoin construction by respondent of an *unlawful extension* to serve the same territory. The effect of such an injunction would necessarily be to require respondent, as a condition precedent to construction of its proposed extension, to apply to the Commission for the necessary certificate of public convenience and necessity, thus insuring an opportunity to the Commission to determine whether the proposed extension of respondent was required by public convenience and necessity.

For purposes of argument, considering the question here presented as one never heretofore decided by this Court, we respectfully submit that our claim finds full support in the admitted facts. However, we submit that in the light afforded by the opinions of this Court in the *Texas & Pacific* case, *supra,* and *Sprunt & Son, et al. v. United States, supra,* it is established beyond reasonable question.

Respondent attempts (pp. 13 and 14, Resp. Br. opposing Petition for Certiorari) to distinguish the *Texas & Pacific* case from this case. No material distinction is shown. That the Texas & Pacific was actually serving the territory invaded and was enjoying a lucrative business therefrom of course made it a party in interest, but, as we have seen, it had no legal right to a continuance of this traffic, or to "that business", and in the absence of such a statutory right as we have here in Paragraph (20) would have been absolutely without any remedy whatever, as this Court expressly

held. Respondent's own citations as to the qualifications essential to a plaintiff seeking injunction in the ordinary equitable action, where no statutory authority exists, demonstrate this. Petitioner here, by virtue of its pending application to serve this very territory, had a real present *interest in maintaining the status quo therein as against an attempted extension of respondent's line into this territory* "without compliance with the Act of Congress, but in violation thereof" (Resp. Br. 13), and by virtue of Paragraph (20) "was entitled to an injunction" enjoining respondent from this violation. In such a suit there is no burden on the plaintiff to show affirmatively that it will, in fact, be actually injured by the violation of law complained of. If the proposed construction would be a forbidden extension, the injunction must issue. In the *Texas & Pacific* case, *supra,* this Court said (70 L. ed. at page 582):

> "The prohibition of paragraph (18) is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction."

What is said by respondents about the *Sprunt* case, *supra,* and *Pennsylvania Railroad* case (*Pennsylvania R. Co. v. United States,* 40 F. (2d) 921) (pp. 14 to 16, Resp. Br.), obviously requires no further comment here.

We have never claimed that petitioner ever had any existing *legal right* invaded or threatened, or any right to maintain this action except such as is conferred by Paragraph (20). Neither did the Texas &

Pacific have any such right. But petitioner, at the time of the institution of this suit and thenceforth *had an actual existing present interest in maintaining the status quo in that territory, as against any proposed extension of a rival's line of railroad into the same territory in violation of this law, sufficient to make it a "party in interest" with relation to such proposed construction.*

II.

RESPONDENT'S PROPOSED CONSTRUCTION WOULD CONSTITUTE AN "EXTENSION" OF ITS LINE OF RAILROAD, WITHIN THE MEANING OF THAT TERM AS USED IN SAID PARAGRAPH (20).

1. Statement of Facts Material on Question Whether Construction Would be an "Extension" of Respondent's Line Within the Meaning of Paragraphs (18) and (20).

The proposed line of respondent to be immediately constructed would be approximately 8200 feet in length, and would extend from its existing line in a general easterly direction, to and across a main state highway known as the Bay Shore Highway, and to and across petitioner's proposed line, and thence almost to the waters of the Bay of San Francisco. The estimated net cost to respondent of this construction is $73,160 (R. 102), plus one-half the cost of a grade separation at the Bay Shore Highway, estimated at between $75,000 and $115,000 (Finding 17, R. 43).

In this connection it is to be noted that the final or revised authority for expenditure for this work, dated August 6, 1928, approved September 13, 1928, states "GMO-68280 (revised) did not provide for extending

the track across the entire Rose estate. It is now proposed to construct 1960 feet of track parallel to its main line track and 8200 feet of track extending therefrom toward the bay to serve the property for its entire width". The map accompanying the authority for expenditure shows the proposed trackage extending across the Rose property *to the Bay* (R. 101, 102, and Plff.'s Ex. 5); and also the map attached to the verified answer herein shows the proposed extension as running to the easterly edge of the Rose property on San Francisco Bay.

Lying between the Bay Shore Highway and the Bay, from South San Francisco on the north to Redwood City on the south, is a large area (approximately 23,000 acres) much of which is or can be made available for industrial occupation. None of this territory has ever been served by respondent's railroad (Finding 7, R. 38, 39). One of the objects of petitioner's proposed railroad was to give railroad facilities to such territory as it may be developed and occupied by industries and settlements, the purpose being to afford such facilities to assist in and bring about occupation and development of such territory by industries and settlements which will require railroad service (Finding 18, R. 43).

The area above referred to is unoccupied and undeveloped, there being no industry or settlement which requires railroad service at this time, or in the immediate future (Finding 16, R. 42).

The Rose property, to which respondent claimed in the lower Court that its immediate construction would be confined, consists of approximately 500 acres within

the corporate limits of the City of San Mateo, adjoining at the end west of the Bay Shore Highway the right of way of respondent's main line right of way, and on its easterly end the waters of the Bay of San Francisco. This property is a part of the area here involved, and has never been served by respondent's railroad, and is unoccupied and undeveloped, and without any industry or settlement requiring railroad service (Testimony General Manager Respondent, R. 106). Respondent has urged heretofore, in support of its claim, that the Rose property is not new territory never before served by it, its sole basis for so contending being that said Rose property at its westerly end adjoins respondent's main line right of way and is situate within the corporate limits of the City of San Mateo,—matters that we claim to be absolutely immaterial here. There is no industry located on any part of this property, either east or west of the Bay Shore Highway.

Petitioner's proposed line traverses this tract from north to south.

In so far as the Rose tract trackage is concerned, the proposed construction is not only alleged in the complaint but also expressly admitted in the answer (R. 18). The answer expressly admits that its proposed track "will not be extended for the purpose of serving any existing industry or settlement, but denies that said track will not be extended to serve any existing demand for railroad service, and *admits* that the territory lying easterly of the plaintiff's proposed railroad and between it and the Bay of San Francisco and extending from said City of South San

Francisco to Redwood City is almost entirely unoccupied and undeveloped and has at present no industry or settlement or anything requiring railroad service now or in the immediate future", but avers in substance that the area to be served by respondent does need railroad facilities in the sense that *the same are desirable for the purpose of assisting in and bringing about the occupation and development of such area for industrial purposes* (R. 19, 20). In the lower Court it was shown that the purpose of respondent with regard to the Rose tract construction was, *not* to serve the owners of that tract, for no service was required or possible, *but,* by the presence of its trackage, to make the tract more attractive to producing industries, to which, if induced to locate thereon, it would furnish railroad carrier service, respondent believing such property to be good potential industrial property. As the general manager of respondent put it "We are willing to lay that (the trackage) down even before the first industry is in sight when, in our judgment, the area under construction is a good potential industrial property" (R. 111).

The Special Master found in effect that the purpose and intent of respondent was to extend its railroad by means of this trackage into this territory, viz., the territory hereinbefore described as lying between plaintiff's proposed railroad as located, and San Francisco Bay, in advance of the plaintiff's railroad (Finding 19, R. 43). He further found that it was its purpose "to extend the said railroad at the easterly end northerly and southerly, and approximately parallel with the railroad of the plaintiff" (Finding 15, R. 42).

These findings have sufficient support in the evidence. There has been no claim made by respondent that its proposed trackage would not be used for service anywhere in the territory involved in this suit by means of extensions therefrom north or south or in any other direction. *That it could be so used is obvious.* The general manager of respondent was entirely frank in his testimony as to the use to which the trackage to be immediately constructed was to be put. He testified that if the trackage were constructed as authorized across the Toll Bridge Highway to the Bay, they could thereby serve industries on the Rose property lying northerly of the road (R. 116). He also said:

> "There is nothing sacred about industries on the Rose property. * * * If industries instead of being on the north end of the track are to the south of it, we would still serve them over the track in question if they are closely adjacent thereto.
>
> We do not propose to cross the Bay Shore Highway with frequency as far as industrial tracks are concerned. * * * That would depend a good deal on conditions. *We would make an endeavor not to cross that highway from our main tracks or the proposed road of the plaintiff here any more frequently than we could avoid. That would lead us to use this track which we are proposing to build across the Rose property for as much territory adjacent to the Bay and adjacent to the Rose property as we could reasonably do rather than cross the proposed Bay Shore Highway at another point*" (R. 117) (emphasis ours).

He further said that he could not say that the desire to avoid crossing the Bay Shore Highway at another place would lead them to use the proposed trackage to get to San Mateo Point, but that it might (R. 117). He further said:

> *"As to the property which lies south of the east and west line which runs say through the easterly terminus of this line projected through the Rose property, I believe we would also turn that line to the south if industries offered immediately to the south, and would have those industries served over this track. * * * The track that we are discussing (the Rose track) might be turned to the right and serve the property along Brewers Island. * * * As the industries develop to the south we would, in time, expect to serve them over this extension or spur that runs over the Rose property, if it were the most convenient and economical way of doing it. One of the factors which we would take into consideration in determining whether we would use this track would be a consideration of whether we had to cross the Bay Shore Highway too frequently. This would be an important factor. By saying what would be economical there to do and what would not be, I am referring to whether it would be cheaper really to serve the industries which might locate out in that territory along the bay over this Rose tract track or over some other track. If it became necessary to cross highways and there had to be a separation of grades that would become an extensive (expensive) thing. The cost of crossing the highway would tend to, other things being equal, extend the limits of this track northerly and southerly. * * * In order to find out just*

what traffic we are going to have move over the Rose property on this track that we are talking about, we will have to wait until we see what industrial development there is out beyond it. When that industrial development occurs then we will meet it with whatever trackage is necessary in the most convenient and economical way" (R. 118-119).

He further said:

"We do not look for any industrial development outside of the Emma Rose property for a long time to come. If there is industrial development, however, on other properties, we would expect to serve the adjacent properties industrially over this track if that proved to be a convenient and economical way of doing so" (R. 123).

The assistant to the freight traffic manager of respondent, referring to the possibility of deep water terminals in this territory said:

*"If the construction of a deep water terminal should take place, my company would expect to serve such terminal or industrial development in whatever manner happened to be the most economical and efficient way of doing it, and if the closest piece of track to serve such development was the Emma Rose track, then that track might be used. * * * Whatever appeared to be the most desirable economic (economical) and proper thing to do would probably be done"* (R. 258) (all emphasis ours).

The president of respondent in a formal written statement to the press, referring to the proposed so-called "industrial trackage" said: "This track, by

extension, also made available properties beyond" (R. 203).

There was no expression whatever from any Southern Pacific officer or any other person that tended to indicate that it was not the intention of respondent to use the Rose trackage in any way that might be found desirable for the service of industries anywhere within the limits of the territory involved in this action, as such territory was found to be by the Special Master (Finding 7, R. 38, 39). There was no pretense that the authority for expenditure under which this construction was being had foreclosed such use, or precluded the construction of any extension thereof under future authorities for expenditure as may be deemed desirable. It was sufficiently admitted that turns of this Rose track to the north and/or to the south would be made if this was found to be the desirable way in which to serve this general territory.

The testimony of responsible officers of respondent hereinbefore referred to is important as showing that the proposed trackage is designed to serve the general territory here involved in so far as it may be found desirable to so do. The desirability of such use is amply shown by the situation on the ground, including the presence of the Bay Shore Highway which can be crossed by a railroad only by an expensive separation of grades, at an expense for each crossing of one-half of from $75,000 to $115,000. That the proposed construction would necessarily be used by respondent in serving all the territory proposed to be served by petitioner would seem obvious even without

any express admission by respondent's officers as to its probable use.

According to Findings 10 and 12 (R. 40, 41), findings not excepted to, respondent, with an attempt to avoid publicity, commenced its construction on *Saturday,* March 23, 1929, *about noon,* and hastily proceeded therewith on that afternoon and the following Sunday so that by Monday morning it had laid a track across the Bay Shore Highway and to and across petitioner's proposed location, altogether some 1442 feet, unballasted, and, except at the Bay Shore Highway location, with the ties not spaced to any apparent standard, a "rush job" with an obvious design to go as far as possible before an injunction could be obtained. At this point the temporary restraining order in this case served to stop the work. Respondent's answer admits (R. 24) that such trackage consists only of rails and ties laid upon the natural surface of the ground without grading or ballast and without being attached to the ground, and *avers* that, unless restrained, it will complete the same.

Efforts were made by officers and employees of respondent to explain the haste and secrecy attendant on this construction attempt, upon a theory other than that it was an effort to actually plant respondent in this new territory in advance of petitioner and without Interstate Commerce Commission authorization.

It is not disputed that the construction of said trackage was undertaken without there first having been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity therefor, and that no application for such a certificate has

ever been filed. Respondent's position with regard to this is alleged in its answer (R. 22, 23) as follows:

> "* * * in this behalf defendant avers that it proposes to construct a spur or industrial track which will be used exclusively for switching carload freight to and from such industries as may hereafter locate along said industrial or spur-track and have carload freights for switching and that said track will be operated within the yard limits and as a part of said station of San Mateo and exclusively as an industrial or spur-track of such station and in accordance with defendant's established policy of developing lands suitable for industrial sites and locations adjacent, contiguous and tributary to and in the immediate vicinity of defendant's said line of railroad requiring railroad services."

The right of way obtained by respondent for the proposed line was for the whole length from 40 to 50 feet in width, a width greater by many feet than the usual width for industrial spurs (Finding 11, R. 40). It was to be fenced on both sides with a good and substantial fence and was to be constructed with second-hand 90 pound rail (R. 166). The trackage to be constructed would not be used for loading and unloading cars and the industries to be served would take their service from spur tracks (R. 111) constructed by them connecting with respondent's trackage.

2. The Service to be Performed by Means of this Unauthorized Southern Pacific Trackage is Precisely the Service that Was to be Performed by the Santa Fe With its Trackage Involved in the Texas & Pacific Case, Supra.

The proposed trackage was styled by respondent's witnesses as a switch industry track as distinguished from an extension, and the particularization of the service to be rendered thereon upon which respondent has consistently relied as rendering it such was stated in its exceptions to the Master's findings as follows:

> "* * * that said track will be used exclusively for switching purposes, no less than carload business will be handled, no passenger trains will be operated over said track, no trains or engines will be operated over said track on time-cards or schedules, the billing of freight to and from industries served by said track will be performed at the present station of San Mateo, there will be no agent located at any point on said track, there will be no telegraph lines operated in connection with said track, there will be no freight sheds nor any station buildings at all located upon or adjacent to said track, operations upon said track will be conducted in the same manner as is usual and customary in switching carload freight to and from industries at other points on defendant's lines, all switching will be performed at night, there will be no storage track for the storage of cars in connection with said track, said track will be a part of defendant's San Mateo Station trackage facilities, rates published in defendant's freight tariffs to and from said San Mateo Station will apply to industries served by said track, no less than carload rates will apply to or from industries served by said track but said less than carload rates will only apply to and

from said San Mateo Station, there will not be any additional switching charge assessed for moving shipments from or to San Mateo Station and from and to industries served by said track, all shipments moving to and from industries served by said track will be billed by defendant's agent at San Mateo as originating at said station and there will be no express or mail service performed upon said track" (R. 53, 54.)

There was no pretense that the service to be given this territory, in the way and to the extent above stated, would not give to the industries that subsequently locate therein all railroad carrier service consonant with their needs, or that, in so far as the industries were concerned, the service would not be precisely the same in substance as if they were located on one of respondent's existing main lines of railroad.

3. Effect to be Given to Special Master's Findings and Conclusions, Approved and Affirmed by District Court.

The Special Master, to whom this case was referred by the District Court by consent of the parties, "to take the testimony and *report the findings of fact and conclusions of law* to the Court * * *, subject to exceptions according to the usual course of chancery practice" (R. 31, 32) (emphasis ours), after a full hearing, which included the taking of much oral testimony and also a personal inspection of the premises (R. 287), found and concluded that the proposed construction by respondent would constitute an extension of its line of railroad in violation of said Paragraph (18), as distinguished from a spur (Paragraph (22)), and so reported (R. 45). This conclu-

sion was affirmed and approved by the District Court (R. 58).

In the case of *Davis v. Schwartz,* 39 L. ed. 289, 155 U. S. 629, this Court, discussing the question of the effect to be given to a Special Master's findings, said (39 L. ed. at page 293):

> "As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable" (citing numerous decisions).

The case of *Kimberly v. Arms,* 129 U. S. 512, 32 L. ed. 764, was referred to in the opinion in *Davis v. Schwartz* as one in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and *his findings when the case is referred to him by consent of the parties, to report his findings of fact and conclusions of law,* as was done in this case, and the Court quoted from the opinion in that case as follows:

> "Its findings, like those of an independent tribunal, are to be taken as presumptively correct,

subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

The Circuit Court of Appeals of the Ninth Circuit in *McCarthy v. Bunker Hill, etc.*, 164 Fed. 927, 940, said, in speaking of the rule of non-interference with the findings of the trial Court in cases in which the evidence is substantially conflicting, that this rule is especially applicable "where the trial judge, at the request of the respective parties, has had the benefit of a personal inspection of the premises"; and also, in *Ladd & Tilton Bank v. Boyle*, 299 Fed. 56 at page 57, in discussing the findings of the Special Master to whom the case had been referred, said that it was satisfied with the findings and report of the Special Master "especially in view of the well established law that under such circumstances the conclusions of the master have every reasonable presumption in their favor and are not to be set aside or modified *unless there clearly appears to have been error or mistake on his part*", citing cases, including *Kimberly v. Arms, supra* (emphasis ours).

It is to be noted again that there was much oral testimony in this matter given by respondent's officers, and the case was peculiarly one in which, to use the language of the Circuit Court of Appeals in *Presidio Mining Co. v. Overton, et al.*, 270 Fed. 388, the finding of a judge who

"has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge

of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, * * * is *persuasive and presumptively correct"* (emphasis ours).

The considerations we have referred to and the authorities we have cited lead to the conclusion that this Court will regard the findings and conclusions of the Special Master, approved by the trial Court after argument before it, as presumptively correct and will not interfere therewith, unless it very clearly appears that there has been error or mistake on his part.

4. Rule to be Applied in Determining Whether Proposed Construction is an Extension as Distinguished From a Spur or Industrial Track Within the Meaning of Paragraphs (18) to (22).

It seems advisable here to discuss briefly another rule believed to be applicable in determining in an action of this character the question whether the proposed construction would be of the character of the trackage specified in Paragraph (22), such as a spur, etc., which is excepted by such paragraph from the effect of Paragraphs (18) and (20). The language of Paragraph (22) in this respect is that "The authority of the Commission conferred by Paragraphs (18) to (21) both inclusive, *shall not extend"* to *such* tracks (emphasis ours). Respondent's principal claim in this respect is that the proposed construction would be a spur or industrial track within the meaning of Paragraph (22).

In *Lancaster v. Gulf, Colorado & Santa Fe Ry. Co.*, 298 Fed. 488, 490 to 492 (the *Texas & Pacific* case in

the District Court of the Southern District of Texas), Judge Hutcheson said that the terms "extension" and "industrial track" have no clear and established statutory restrictive definition, but, on the contrary, have a wide latitude of meaning "according to the context in which they are used", and that since Congress had not undertaken to define the words and it was plain that they *may* be, according to the angle of approach, given wide and varied meaning, the purpose of the Act must be drawn from its entire structure, "and that purpose, together with the context in which the words are used, must at the last be the guide to the interpretation of the words at issue".

This view of Judge Hutcheson was expressly approved by this Court in the *Texas & Pacific* case, *supra*. This Court said (70 L. ed. at pp. 583, 584):

> "In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites *instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes.* It points also to *uses made of these terms* in other connections by courts, (the note specifying particularly, among other cases, the *Los Angeles Switching* case, 234 U. S. 294, affirming 18 I. C. C. Rep. 310, 312, 313, relied on principally by respondent in the proceedings below) *by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in Paragraphs (18) to (22) is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920"* (emphasis ours).

This Court, after stating this policy, said:

"When the clauses in Paragraphs (18) to (22) are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. * * * If the purpose and effect of the new trackage is to *extend substantially the line of a carrier into new territory,* the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph (18), *although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.* Being an extension, it cannot be built unless the Federal commission issues its certificate that public necessity and convenience require its construction. The Hale-Cement line is clearly an extension within this rule" (all emphasis ours).

5. The Proposed Extension of Respondent Was Into New Territory, Not Theretofore Served by it.

It would appear unnecessary, in view of the record, to do more than to discuss this question very briefly.

It is unquestioned that the whole of the territory here involved is, in so far as direct railroad service is concerned, virgin territory, never served by any railroad, and without anything therein immediately requiring such service. When this Court said in the *Texas & Pacific* case, *supra,* "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into *new territory,* the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph (18)", and *"into territory not theretofore served by the carrier",*

(70 L. ed. at p. 584) (emphasis ours) it is submitted that the Court necessarily meant territory not theretofore *actually and directly* served by a carrier by its existing railroad. There could have been no thought of anything in the nature of *constructive* service by reason solely of the location of the existing railroad being such as to enable it by a short extension to easily reach other territory and thereby serve the same. Such a thought would be repugnant to the whole purpose of Congress in enacting this legislation which was to prevent railroad extensions not found by a neutral expert tribunal to be required by public convenience and necessity, in view of the conclusion of Congress that this policy was essential to the development and maintenance of an adequate railway system for the people of the United States. Congress recognized, as was said by this Court in the *Texas & Pacific* case,

> "that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss" (70 L. ed. at p. 584).

When the matter is considered in the light of the principles and policy declared in the *Texas & Pacific* case, it would seem plain that the mere fact that the

territory proposed to be served by the new trackage is situate within the corporate limits of a city or town already traversed by the railroad to be extended is wholly immaterial in determining whether the new construction would be an "extension" within the meaning of these statutory provisions. It might be contended with as much reason that the territory presently served comprised the *whole state* in which the company has an existing line. It is a matter of common knowledge that the most expensive construction and the fiercest competition are to be found in our larger cities, and the supervisory power as to extensions is more necessary there than elsewhere. No authority is cited in support of the suggestion that the prescribed corporate limits of a city or town play any part whatever in the determination of the territory served by a carrier, in the sense here involved, and such a suggestion is opposed to the whole spirit and purpose of the sections of the Transportation Act of 1920 here involved.

An illustration of this situation is to be found in *Missouri Pac. R. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 41 F. (2d) 188, in which the Circuit Court of Appeals of the Eighth Circuit in effect ruled that in a single city there may be territory within 3700 feet of its rails, adaptable to industrial purposes, reasonably accessible to each of two railroad carriers serving the city, *which is not in fact occupied or served by either*, and that in such event neither can occupy and serve such territory without authorization under said Paragraphs (18) to (21). Certiorari was denied by this Court in that case, on October 20, 1930.

So also must the fact that the Emma Rose tract, which extends miles to the Bay of San Francisco, abuts on its westerly end respondent's right of way through the City of San Mateo, be held to be *of no importance whatever* in determining what *territory* is now served by respondent within the meaning of the *Texas & Pacific* decision. *Ownership by a single interest* of a vast territory means nothing in this connection. As to the very small portion of this tract adjoining such right of way it might fairly be admitted that industries thereon could be served by means of a spur or industry track within the meaning of said Paragraph (22). In the *Texas & Pacific* case, *supra*, this Court, discussing the terms "spur, industrial, switching," etc., tracks, said (70 L. ed. at p. 584):

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, *who being within the same territory and similarly situated are entitled to like service from the carrier*" (emphasis ours).

It is to be borne in mind that this proposed track is not designed to give *"rail service"* to the *owners of the Emma Rose tract*. They want no railroad transportation service. The whole plan is, through making the Emma Rose property attractive to purchasers desiring locations for industrial sites by furnishing a railroad track thereover (thus enabling the owners to subdivide and sell to industries this area, *now unoccupied and undeveloped*), that this area *will*

become a new railroad traffic producing area or settlement served by respondent.

We respectfully submit that upon no reasonable theory can any of the territory here involved be held to be other than *new territory not heretofore served by respondent.*

6. The Proposed Trackage Would Constitute an Extension of its Line of Railroad by Respondent, Within the Meaning of Said Paragraphs (18) to (22) by the Test Laid Down in the Texas & Pacific Case.

It is impossible, we submit, to distinguish in any material respect, the *Texas & Pacific* case, *supra*, from this case. In view of the opinion in that case, concurred in by all the members of the Court except Mr. Justice McReynolds, who dissented upon a ground not pertinent to this particular question, and the fact that it has ever since been cited and followed continuously by the Courts without modification in any respect by any subsequent decision, we feel that it will be unnecessary here to do more than to show the striking similarity of the two cases in all material respects, and the consequent applicability to this case of the ruling in that case.

In that case, both the Texas & Pacific and the Santa Fe lines ran through the City of Dallas, Texas, and beyond, the Texas & Pacific in a general westerly direction and the Santa Fe in a general southwesterly direction. Located about 2½ miles westerly of Dallas and on the Texas & Pacific was the so-called "industrial district" served by the Texas & Pacific and which the Santa Fe also desired to reach, the latter's existing line being, at its station of Hale, some 3¼

miles air-line distance from such district. The traffic of this district moved in carload lots, and that destined via Santa Fe was interchanged by the Texas & Pacific at points on its line distant from 12 to 30 miles from the industries. The Santa Fe proposed to serve the industries in this district with its own rails by constructing trackage from its Hale Station thereto (*Texas & Pacific* case, *supra*, 70 L. ed. at pp. 582, 583). Of this situation and the claim that the proposed trackage would constitute a spur or industrial track as distinguished from an extension, this Court said (70 L. ed. at p. 583):

> "The Hale-Cement Line is clearly not a spur in the sense in which that word is commonly used. It *presents some of the characteristics of a branch; and a branch is clearly an extension of a railroad within the meaning of Paragraph 18. The Santa Fe contends that it constitutes an industrial track within the meaning of Paragraph 22, because the line is to be constructed solely for industrial purposes.* It shows that, according to the plans, *the general public is not to be served; that, except at Hale, there will be no public station for the receipt or delivery of freight; no telegraph service; no express, mail, or passenger traffic; that the transportation between Hale and the industries will be confined to carload freight; that it will be conducted as a switching service for which no charge will be made; and that the Hale rate will apply to all traffic on the projected line. It argues that a branch is a line serving one or more stations beyond the point of junction with the main line or another branch, and to or from which stations regular tariff rates are in effect; that an industrial track is a line con-*

structed to serve or reach industries over which regular scheduled passenger or freight train service is not performed and for transportation over which only a switching charge, if any, is made; and that neither the length of the line, nor the character of the construction, can convert into a branch a line of the nature described" (emphasis ours).

The Court followed this statement with the statements hereinbefore quoted at pages 42 and 43 of this brief.

It would seem that no distinction material here can be drawn between these cases, and that the facts asserted by respondent (see pp. 36, 37, 38, *supra*) upon which it bases its claim that the proposed trackage does not constitute an "extension" demonstrate lack of any material distinction.

In the light of the opinion in the *Texas & Pacific* case, *supra*, it is clear that the fact that in the *Texas & Pacific* case there were *existing industries which were then being served* by the Texas & Pacific is altogether immaterial in determining whether the new trackage would be an "extension" within the meaning of said Paragraphs (20) to (22). It was one of the purposes of this legislation to protect against any waste of the resources of any carrier by construction of unnecessary lines, and the approval of the Interstate Commerce Commission was therefore required as to *any* extension into territory not theretofore served by it, entirely regardless of whether such territory is served by any other carrier.

Much stress was laid by respondent in the Courts below upon the fact that the proposed trackage would

constitute what it called an "industrial development track", a track constructed into new territory in the general vicinity of territory already served by it, for the purpose of attracting industries to such new territory, which industries it will be enabled to serve directly by such trackage. Surely such trackage would constitute an extension of its line within the meaning of Paragraph (18) just as much as if it were to be constructed into territory already overflowing with industries, and was just as much within the contemplation of Congress in enacting this legislation as was the proposed Santa Fe line. If industries subsequently locate therein, respondent *will serve them and the territory in which they locate.* If industries do not locate therein, the construction expenditure *will have been wholly wasted,* one of the very things specified by this Court as recognized by Congress as being of national concern in the matter of maintaining for the people of the United States an adequate railway system. The approval of some neutral official body in such a case, involving as it does this element of speculation on the part of the carrier in making its investment (which may be very substantial in amount), is just as necessary as in the case of any other proposed construction, in order to preclude such construction as is not reasonably necessary in the interest of public convenience and necessity.

It should be here noted that, as to the Emma Rose tract, to which respondent asserts it proposes to confine its construction, the facts claimed by us to show an extension as to which a certificate of public con-

venience and necessity is requisite, are fully admitted and expressly avowed by respondent.

It has been earnestly claimed by respondent that it has been its practice and the practice of other interstate carriers, ever since 1920, to construct such industrial development trackage without obtaining the approval of the Interstate Commerce Commission. It introduced certain evidence to that effect as to itself, and some as to petitioner and the Santa Fe. Many of the illustrations were of construction prior to the year 1926, in which year the *Texas & Pacific* case, *supra,* was decided by this Court, when, for the first time, the meaning of the term "extension" in Paragraph (18) was definitely and authoritatively determined. That there was a difference of opinion in this regard prior to this decision was well illustrated by the *Texas & Pacific* case itself, in which the decision of the District Court was in accord with that of this Court, while that of the Circuit Court of Appeals was directly opposed thereto. We believe it cannot be successfully disputed that, ever since this Court's decision, interstate railroad carriers have more substantially complied with the requirement of the statute as that requirement was defined by this Court in that case. However this may be, it is perfectly clear that prior construction of unauthorized trackage without the necessary authorization cannot change the law or afford any defense in the matter here involved. That the law may have been violated in the past by respondent and one or two other carriers, can constitute no defense to a charge of subsequent violation. There was no attempt to show such a gen-

eral practice throughout the country, or any acquiescence therein as proper by the Commission or other governmental authorities, and the evidence introduced affords no basis for a construction so manifestly opposed to the plain language of the statute as well as to the whole spirit and purpose thereof.

We respectfully submit that there is no escape from the conclusion that the proposed trackage of respondent would constitute an extension of its line of railroad within the meaning of said Paragraphs (18) to (22) and the opinion of this Court in the *Texas & Pacific* case, *supra*. In the instant case respondent is in reality attempting to obtain a modification of the views expressed in the *Texas & Pacific* opinion which would have the effect of rendering said Paragraphs (18) to (21) ineffective to accomplish the purpose of their enactment. Surely such would have been the situation if this Court in the *Texas & Pacific* case had accepted the narrow and technical construction of the term "extension" contended for by the respondent in that case and by the respondent here. But this Court, keeping constantly before it as its guiding star the obvious purpose of Congress in enacting this legislation, gave to the language used a perfectly justified meaning and the only meaning wholly consistent with that purpose.

To require, as a condition precedent to such construction as is here proposed by respondent, a certificate of public convenience and necessity from the Interstate Commerce Commission, imposes on a carrier no disadvantage or burden as to construction reasonably required in the public interest. If respond-

ent's plan is in full consonance with the purposes to be accomplished by said Paragraphs (18) to (21), there is no reason to doubt that the Commission will grant its application for a certificate. If not in consonance with those purposes, authorization will be denied, as, of course, it should be. This question is, under the law, one for the Commission, not the respondent here, to determine.

SUMMARY OF PETITIONER'S CONTENTION.

We respectfully submit that:

1. Petitioner is, and was at the time of the institution of this suit, and thenceforth to the entry of final decree, a *"party in interest"* within the meaning of that term in said Paragraph (20), with relation to the proposed construction of respondent, because, by virtue of its pending application for authority to construct through the same territory, it had an ever present interest in maintaining the *status quo* in that territory with relation to railroad construction therein, as against any unauthorized and unlawful construction by another carrier; and, as such party in interest, was entitled to institute and maintain this suit by virtue of the statutory authority to so do conferred by said Paragraph (20).

2. Respondent's proposed construction, both as to the Emma Rose tract and all the remainder of the territory involved, is into "new territory not theretofore served by it", and would constitute an "extension" of its line of railroad within the meaning of said Paragraphs (18) to (22). Respondent has not

procured nor attempted to procure from the Interstate Commerce Commission the certificate of public convenience and necessity required by said paragraphs as a condition precedent to such construction.

For these reasons we respectfully ask that the judgment of the Circuit Court of Appeals of the Ninth Circuit herein be reversed and that the judgment of the District Court for the Northern District of California be affirmed.

Dated, San Francisco, California,
September 12, 1931.

F. M. ANGELLOTTI,
H. P. TYLER,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

Statutory provisions involved:

Paragraphs (18), (19), (20), and (22) of Section 1 of the Interstate Commerce Act (U. S. Code, Ann., Title 49, Section 1, Paragraphs (18), (19), (20), and (22)), contained in the Transportation Act of 1920, are as follows:

> Paragraph (18). After ninety days after this paragraph takes effect *no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof,* or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction of operation, or construction and operation, of such additional or extended line of railroad,* and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment (emphasis ours).
>
> Paragraph (19). The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and

other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the Governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Paragraph (20). The commission shall have power to issue such certificate as prayed for or to refuse to issue it, or to issue it for a portion or portions of a line of railroad or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. *From and after issuance of such certificate, and not before, the carrier by railroad may,* without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and *proceed with the construction, operation, or*

abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of Paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of Paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both (emphasis ours).

Paragraph (22). The authority of the Commission conferred by Paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 240, Sub. (a), of the Judicial Code, (U. S. Code, Ann., Title 28, Section 347, Sub. (a)), is as follows:

Section 347. Certiorari to circuit courts of appeals and Court of Appeals of District of

Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 51

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation), *Petitioner*,

vs.

SOUTHERN PACIFIC COMPANY (a corporation), *Respondent*.

RESPONDENT'S REPLY BRIEF TO PETITIONER'S BRIEF FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 896.

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY (a corporation), *Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY (a corporation), *Respondent.*

RESPONDENT'S REPLY BRIEF TO PETITIONER'S BRIEF FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The sole question involved is whether petitioner was a "party in interest" within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act and thereby entitled to maintain a suit in the United States District Court to enjoin respondent from constructing a track 8200 feet in

length leading from its main line in the City of San Mateo, State of California, across a tract of land immediately adjacent to its right of way, for the purpose of switching carload freight from and to industries which contemplated locating thereon.

At the time petitioner instituted the suit in the United States District Court it only had a charter, and had made an application to the Interstate Commerce Commission for a certificate of public convenience and necessity, but possessed no right of way, it was without any railroad, without any traffic to protect, and the record fails to disclose that the construction and operation of respondent's proposed track would injure petitioner or cause it to suffer any damage.

It is stated at page 5 of the petition for writ of certiorari that "It can not be questioned that the decision of the Circuit Court of Appeals holds that, * * * the construction proposed by respondent would constitute * * * an extension of its line of railroad within the meaning of said Paragraghs (18) and (20) * * *," nevertheless on the preceding page 4, petitioner states "The Circuit Court of Appeals declined to decide the question 'whether the line contemplated by the applicant is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the State Commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission' (Opinion, R. 318–322)."

While other important questions were involved the Circuit Court of Appeals for the Ninth Circuit reversed the judgment entered by the District Court of the United States for the Northern District of California, Southern Division, upon the sole ground that

petitioner was not a "party in interest" within the meaning of paragraph (20) of Section 1 of the Act.

The Circuit Court of Appeals stated that it was deemed "unnecessary, if not improper, to consider the doubtful and perplexing question whether the line contemplated by the appellant (respondent) is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission."

The Circuit Court of Appeals predicated its decision upon the fact, which was not controverted, that petitioner had "been organized as a corporation," had "projected a line of railroad" and had "applied to the Interstate Commerce Commission for a certificate of necessity. On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant (respondent) from building a spur track, or extending its line, as the case may be."

The Circuit Court of Appeals held that "such showing will not, in our opinion, support or justify an injunction such as was granted here." (46 Fed. Rep. (2d) 729, 730-31).

It is therefore deemed unnecessary to answer the argument interwoven in petitioner's brief with respect to the other questions which were presented to the Circuit Court of Appeals.

PETITIONER IS NOT A "PARTY IN INTEREST" WITHIN THE MEANING OF PARAGRAPH (20) OF SECTION I OF THE INTERSTATE COMMERCE ACT AND THEREFORE IS NOT ENTITLED TO MAINTAIN A SUIT FOR INJUNCTION TO RESTRAIN RESPONDENT FROM CONSTRUCTING ITS PROPOSED TRACK.

(1) In Order to Entitle a Plaintiff to Maintain an Action Under Paragraph (20) He Must Be Possessed of Some Independent Legal Right of His Own Which Will be Invaded by a Theatened Construction.

Paragraph (20) does not define "party in interest" and therefore a party entitled to maintain an action contemplated by that paragraph must possess those qualifications requisite to enable a party to maintain a suit in equity for an injunction.

Cates v. Allen, 149 U. S. 451, 458, decided that

> "Doubtless new classes of cases may by legislative action be directed to be tried in Chancery, but they must, when tested by the general principles of equity, be of an equitable character, or based on some recognized ground of equity interposition."

If petitioner does not possess the qualifications usually required by the general principles of equity to maintain a suit for injunction, petitioner is not a "party in interest" within the meaning of paragraph (20). It is an established rule that a court of equity concerns itself only with the protection of property rights, and under this rule it treats any civil right of a pecuniary nature as a property right.

International News Service v. Associated Press, 248 U. S. 215, 236;
In re Debs, 158 U. S., 564, 593;
In re Sawyer, 124 U. S. 200, 210.

An injunction is issued for the purpose of preventing existing, impending or presently threatened injury.

Connecticut v. Massachusetts, decided February 24, 1931, Advance Opinions, 75 L. Ed. 297, 304;
Pierce v. Society of Sisters, 268 U. S. 510, 536;
New Jersey v. Sargent, 269 U. S. 328, 331;
Truly v. Wanzer, 5 Howard 141, 142;
Behre v. Anchors Ins. Co., 297 Fed. 986, 989.

Injunction does not issue because of mere fear or apprehension or against something merely feared as liable to occur at some indefinite time in the future.

Connecticut v. Massachusetts, supra;
Behre v. Anchors Ins. Co., supra;
Truly v. Wanzer, supra.

There must be an invasion of a right with existing or presently threatened injury before a party has a standing in a court of equity to maintain a suit for an injunction.

Massachusetts v. Mellon, 262 U. S. 447, 488;
Rindge v. Los Angeles, 262 U. S. 700, 709-710;
Heald v. District of Columbia, 259 U. S. 114, 123;
Arkadelphia Co. v. St. Louis, S. W. Ry. Co., 249 U. S. 134, 149;
Cusack Co. v. City of Chicago, 242 U. S. 526, 530;
Plymouth Coal Co. v. Penn, 232 U. S. 531, 545.

Petitioner must base its right to an injunction upon its own rights and not upon a lack of right in respondent.

Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143;
Larimer Ry. Co. v. Railway Company, 137 Pa. St. 533.

Petitioner must show an independent existing right in itself and an existing or presently threatened injury to such right in order to maintain a suit in equity for an injunction.

Sprunt & Son v. United States, 281 U. S. 249, 254-257.

In *Larimer Railway Co. v. Railway Co., supra*, one street railway company filed a bill in equity to restrain another street railway company from constructing its railroad. The Court held (p. 547):

"If, then, the appellants have not, in any way, obtained the consent of the city of Pittsburgh to enter upon these streets for the construction of their road what standing have they in a court of equity to test the right of the appellees? The consent of the city is a condition precedent to the exercise of their rights under the charter; without this, they have no right, present or prospective, to construct their railway upon the highways of the city, for *non constat* that this consent will ever be given. It may be that the appellees have no better right; we will decide that question when it arises, but it is plain the appellants have no standing to raise this question for our consideration."

In *Edward Hines Yellow Pine Trustees v. United States, supra,* lumber manufacturers and dealers brought suit against the United States to set aside as void an order of the Interstate Commerce Commission requiring carriers to cease and desist, until the further order of the Commission, from collecting a penalty charge of $10.00 per day on lumber held at reconsignment points. In dismissing the bill this Court held (p. 148):

> "But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges."

If petitioner can be said to have any interest at all, it is vague, speculative and unsubstantial. It is very much like the interests involved in *Edward Hines Yellow Pine Trustees v. United States, supra,* and in *Pittsburgh & West Virginia Ry. v. United States,* 281 U. S. 479.

In the *Hines Case,* in addition to the claim that plaintiffs would be injured as shippers, set up as a

basis for an injunction, it was also claimed that the plaintiffs would be injured as a prospective carrier. Plaintiffs were constructing a local railroad which would soon be ready for operation and it was contended that their cars which would move over this railroad to connecting lines would, in the absence of a deterring penalty charge, be used for temporary storage at reconsigning points. In disposing of this claim, this Court said (p. 148):

> "The further claims of plantiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief."

In the case at bar, petitioner expects to construct and operate a railroad some time in the future. It fears that the construction of respondent's proposed track will injure it in the future, if it does construct and operate a railroad. If petitioner's fears are realized it will be open to petitioner to apply for injunctive relief, provided, of course, respondent's construction and operation of its track is contrary to law.

In the *Pittsburgh & West Virginia Case, supra,* that railroad brought suit to set aside an order of the Interstate Commerce Commission permitting the Wheeling and Lake Erie Railway Company to abandon its station in the City of Cleveland and to use

a union station instead. In endeavoring to show that it had an interest in the matter sufficient to maintain the suit for an injunction, the Pittsburgh contended, among other things, that the Wheeling and Lake Erie and the Pittsburgh had been allocated to one system in the Commission's plan for the consolidation of railroads and that it was seeking to acquire control of the Wheeling. This Court held: "but these vague speculative interests are clearly insufficient to give the Pittsburgh an independent standing in this suit." So lightly did this Court regard these speculative interests of the Pittsburgh that it disposed of them in a foot note.

(2) A Plaintiff Cannot Maintain an Action Under Paragraph (20) to Protect the Public's Interest.

It is argued by Counsel for Petitioner:

> "We believe we do not exaggerate when we say that the 'party in interest' is the most important cog in the machinery provided by Congress in so far as the injunctive remedy is concerned."

It is further argued that as this Court has held that paragraphs (18)-(20) "were designed in the interests of the public to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service;" that a party situated as is petitioner "is perforce an additional guardian of the public interests in seeing that any construction in violation of law is stopped." "The Interstate Commerce Commission with its manifold nation-wide duties, however efficient and zealous it may be, cannot police the

whole country. And there is no special interest to spur any State Body to action in such cases."

This argument cannot overcome the rules established by the cases cited and is completely answered by the suggestion that if the interest of the public is threatened or a railroad undertakes any construction, operation or abandonment contrary to the provisions of paragraphs (18) and (19) it may be enjoined by a suit instituted by the Interstate Commerce Commission, a commission or regulating body of the [illegible] states affected, or penalties imposed [illegible] United States, and that if [illegible] to learn of such infraction [illegible] be directed thereto [illegible] thereof.

[illegible] Congress to pro- [illegible] injunction to [illegible] has [illegible] It is not [illegible] a private [illegible] merely [illegible]

New York [illegible]
[illegible]

Under [illegible] individual [illegible] only when [illegible] peculiar [illegible]

Coley v. Campbell, [illegible] Misc. 86[illegible] Supp. 679, 681;
Greene v. Holmes, 201 Ind. 123; 166 N. E. [illegible] 283;

Oleand v. Woldenberg, 185 Wisc. 510; 201 N. W. 807, 808;
Woods v. Kiersky (*Tex. Com. App.*) 14 S. W. (2d) 825, 828;
United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 310.

Threatened commission of an offense against the laws of the land is insufficient to call into exercise the injunctive powers of the court.

In re Debs, supra, p. 593

Courts of equity have no jurisdiction to enjoin the commission of a crime or the violation of law.

Stoner v. Underseth, 85 Mont. 11; 277 Pac. 437, 443.
Perrin v. Mountain View Mausoleum Association, 206 Cal. 669, 275 Pac. 787.

A private individual has no standing in equity to enjoin an injury threatened to purely public rights.

Joseph v. Weland Davis Co., 297 Ill. 474; 131 N. E. 94.

(3) The Decision of The Circuit Court of Appeals is Not in Conflict or Inconsistent With the Decisions of This Court.

(a) Petitioner contend that the decision [illegible] Court of Appeals is in con- [illegible] *Company v. Gulf,* [illegible] *Company,* 270 U. S. [illegible] *Baltimore & Ohio Rail-* [illegible] *States* (Chicago Junc- [illegible] *Alexander Sprunt &*

Son, Inc. et al. v. United States, 281 U. S. 249, and argue that their contention is sustained by *Edward Hines Yellow Pine Trustees v. United States,* 263 U. S. 143, and *Pennsylvania R. Co. v. United States,* 40 Fed. (2d) 921.

An examination of these cases disproves this contention.

In the *Chicago Junction Case* the carriers instituting the suit were parties to a proceeding before the Interstate Commerce Commission, having intervened as a matter of right expressly granted by the statute. The Court held (pp. 267-68):

> "The plaintiffs may challenge the order because they are parties to it. The Judicial Code, Section 212 * * * declares that any party to a proceeding before the Commission may, as of right, become a party to 'any suit wherein is involved the validity of such order.' The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. * * * Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest."

In the case cited the Court merely held that where parties by intervention expressly authorized by the statute, become parties to a proceeding they may avail themselves of the right to prosecute an action in the courts to review the Commission's order. The plaintiff in the *Chicago Junction Case* was actually engaged in operating a railroad within the territory involved, and *existing* as distinguished from *prospective* or *potential* rights were involved.

Plaintiffs in the Chicago case were in possession of a right and this right was invaded, to their injury.

They, therefore, possessed the qualifications required by law to make them parties in interest so that they could maintain a suit for an injunction. The cited case differs from the case at bar in that in the latter case petitioner has no existing right and it necessarily follows that there can be no injury to a right not in existence. Even if petitioner ultimately acquires any right as a result of obtaining permission from the Interstate Commerce Commission to construct its proposed railroad and constructs its proposed railroad under such permission, there is no evidence in the record showing that the construction and operation of respondents track will result in any injury whatever to petitioner.

The *Texas & Pacific Case, supra,* is entirely different from the one at bar. In that case the Texas & Pacific was actually serving, under a legal right to do so, the territory involved and it was enjoying a lucrative business therefrom. The Santa Fe was attempting to build an extension of line into the territory served by the Texas & Pacific without securing a certificate of public convenience and necessity, for the purpose of diverting a substantial part of the Texas & Pacific business, necessarily resulting in serious injury to the Texas & Pacific. As against the Santa Fe attempting to serve that territory without compliance with the Act of Congress, but in violation thereof, the Texas & Pacific had a right, under the law, to that business and it was entitled to an injunction against the Santa Fe seeking to invade that right to its injury.

In the case under consideration the Southern Pacific Company is already serving the territory involved. It is seeking to build an industrial spur or

switching track upon a tract of land containing 500 acres immediately adjacent to its main line right of way, which constitutes a part of the territory served by it for many years. Petitioner has no right of way, it has no railroad, and it has no business and it does not appear from the record whether it will ever have either a railroad or a business. There is no showing that the construction of respondent's proposed industrial spur or switching track will injure petitioner even if petitioner ever builds its railroad and secures a business.

The Texas & Pacific had an independent existing right which it was entitled to protect against invasion to its injury; the petitioner in this case has no right to be protected.

In the case of *Sprunt & Son v. U. S., Supra,* it was held that where shippers enjoyed a competitive advantage which entitled them to intervene in an administrative proceeding before the Interstate Commerce Commission, and were thereby entitled under Section 212 of the Judicial Code to intervene in any suit "wherein is involved the validity" of the order entered by the Commission, nevertheless they did not have a sufficient interest to entitle them to maintain an independent suit to vacate and set aside an order of the Commission.

This case supports respondent's contention that when Congress employed the words "party in interest" in connection with an injunction proceeding, it contemplated that one is only a "party in interest" for this purpose, when such party has such an interest as is necessary under established principles of equity jurisprudence to enable the party to maintain an injunction suit. A "party in interest" in administrative proceedings before the Commission

must be one who is entitled to participate in such administrative proceedings. The Sprunt case sustains the principle that a party has no standing to maintain an independent suit for an injunction unless some right of his own has been violated to his injury.

The analysis hereinbefore made of the case of *Edward Hines, etc. v. United States* shows that this case does not support petitioner's contention.

Even though petitioner should subsequently construct a railroad and acquire a business there is no evidence in the record to show that the construction of respondent's proposed track will or may subject petitioner to any injury. Petitioner is seeking an injunction because of its fear or apprehension that in the event it should at any time in the future construct a railroad and attract traffic to its proposed line, the construction of respondent's proposed track may interfere with any rights which it may acquire. It is seeking to enjoin something which may or may not occur in the future. It possesses no rights *in esse* and predicates its case upon mere expectation.

Counsel cite *Pennsylvania Railroad Company v. United States*, 40 Fed. (2d) 921, as authority for the proposition that a carrier has "nothing in the nature of a legal right" as against an existing or possible competitor for the traffic of the territory served by it. The case cited does not sustain this contention. That was a suit to set aside an order of the Interstate Commerce Commission authorizing another railroad carrier to extend its line into territory then exclusively served by the Pennsylvania. The case was decided in accordance with the familiar principle that, as against the United States, one carrier has no such property interest in its territory and business as would permit it to enjoin another carrier from coming into and

serving the same territory under authority from the United States.

The Pennsylvania case has no bearing on the question under consideration.

CONCLUSION.

When paragraph (20) is interpreted in the light of established principles of equity jurisprudence as enunciated in the cases herein cited, its purpose and meaning are clear. Obviously, it was not the intention of Congress to authorize the use of injunction to prevent violations of law or crimes as such. From the standpoint of crimes or violations of law, paragraphs (18) and (19) are to be enforced by fine or imprisonment or both as provided by paragraph (20). Injunction is to be employed to protect the unlawful invasion of existing rights resulting in injury in accordance with established principles of equity jurisprudence.

The rights to be protected are those of the public in interstate commerce on the one hand and of private individuals on the other. The rights of the public are to be protected by the use of an injunction obtained at the suit of "the United States, the Commission, any commission or regulating body of the State or States affected," while the rights of individuals are to be protected at the suit of "any party in interest," that is, of any party who possesses an existing right which may be invaded by unauthorized construction or operation to its injury, either existing or presently threatened. A "party in interest" may resort to a court of equity for the protection of its rights and it need not rely on designated agencies of the government to act for its protection. Like-

wise, the designated agencies of the government may resort to a court of equity to protect public rights and need not wait for a "party in interest" to act for the protection of public rights.

By providing that any "party in interest" may maintain a suit to enjoin unauthorized construction or operation, without further defining "party in interest," Congress has clearly indicated that such "party in interest" must meet all the requirements usually necessary, under established principles of equity jurisprudence, to entitle a party to protection by the extraordinary and drastic remedy of injunction. In other words, a "party in interest" must have an existing independent right which is being invaded to its injury, either actual or presently threatened.

Petitioner, without a right of way, without a railroad, and without a business to protect, and without showing that it will be injured by the construction and operation of respondent's track, if it should ever have a railroad and a business, clearly has no right, under settled rules of equity jurisprudence to maintain its suit for an injunction.

Petitioner is not a "party in interest" within the meaning of that term as used in paragraph (20) and it therefore has no standing in equity to maintain its suit for injunction. The petition should be denied.

Respectfully submitted,

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GUY V. SHOUP,
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FILE COPY

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1931

No. 51

WESTERN PACIFIC-CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, (a corporation),
Respondent.

BRIEF FOR RESPONDENT

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1931

No. 51

WESTERN PACIFIC-CALIFORNIA RAILROAD COMPANY (a corporation),
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, (a corporation),
Respondent.

BRIEF FOR RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO REVIEW A JUDGMENT REVERSING A JUDGMENT OF A DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Statement of the Case.

The sole question which is presented for determination by the petition for writ of certiorari is whether

petitioner was a "party in interest" within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act and thereby entitled to maintain a suit in the United States District Court to enjoin respondent from constructing a track 8200 feet in length leading from its main line in the City of San Mateo, State of California, across a tract of land immediately adjacent to its right of way, for the purpose of switching carload freight from and to industries which contemplated locating thereon.

At the time petitioner instituted the suit in the United States District Court it only had a charter, and had made an application to the Interstate Commerce Commission for a certificate of public convenience and necessity, but possessed no right of way, it was without any railroad, without any traffic to protect, and the record fails to disclose that the construction and operation of respondent's proposed track would injure petitioner or cause it to suffer any damage.

While other important questions were involved the Circuit Court of Appeals for the Ninth Circuit reversed the judgment entered by the District Court of the United States for the Northern District of California, Southern Division, upon the sole ground that petitioner was not a "party in interest" within the meaning of paragraph (20) of Section 1 of the Act.

The Circuit Court of Appeals stated that it was deemed "unnecessary, if not improper, to consider the doubtful and perplexing question whether the line con-

templated by the appellant (respondent) is a spur or industrial track, wholly within a state and within the exclusive jurisdiction of the state commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission."

The Circuit Court of Appeals predicated its decision upon the fact, which was not controverted, that petitioner had "been organized as a corporation," had "projected a line of railroad" and had "applied to the Interstate Commerce Commission for a certificate of necessity. On these facts, without more, without a railroad, without a right of way, and without traffic to protect, it sought a permanent injunction enjoining the appellant (respondent) from building a spur track, or extending its line, as the case may be."

The Circuit Court of Appeals held that "such showing will not, in our opinion, support or justify an injunction such as was granted here," (46 F. (2d) 729, 730-731).

The sole ground relied upon by counsel for petitioner in their petition for a writ of certiorari was that the Circuit Court of Appeals erroneously decided that petitioner was not a party in interest within the meaning of those words as used in paragraph (20) of Section 1 of the Interstate Commerce Act.

In their brief (p. 6), counsel for petitioner assign as error the failure of the Circuit Court of Appeals to hold that respondent's proposed track is an extension

within the meaning of that term as used in paragraph (20) and that question is fully argued. On this review, this Court may consider and decide the issue which the Circuit Court of Appeals deemed it unnecessary to consider in view of its conclusion that petitioner was not a "party in interest." The better practice, however, is for this Court to confine its consideration to the ground relied on in the petition for the writ. If this Court should decide that petitioner is a "party in interest" within the meaning of paragraph (20), the case should then be remanded to the Circuit Court of Appeals to determine the issues of fact and law involved in the question whether respondent's proposed track is a spur or industrial track, wholly within a state and within exclusive jurisdiction of the State Commission, or whether it is an extension requiring the approval of the Interstate Commerce Commission.

Gunning v. *Cooley*, 281 U. S. 90, 98;
Webster Co. v. *Splitdorf Co.*, 264 U. S. 463, 464;
Liberty Oil Co. v. *Condon National Bank*, 260 U. S. 235, 245.

While we deem it unnecessary, under the better practice, to argue the other questions involved in this case, we have done so in order that this Court may dispose of the whole case in the event the Court considers it desirable to do so.

STATUTES RELIED UPON.

The statutes relied upon are set forth in the Appendix to this brief. They consist of paragraphs (18), (19), (20) and (22) of Section 1 of the Interstate Commerce Act (U. S. C. A., Title 49, Section 1, paragraphs (18), (19), (20) and (22)), and Section 240(a) of the Judicial Code (U. S. C. A., Title 28, Sec. 347(a)).

Argument.

I.

PETITIONER IS NOT A PARTY IN INTEREST WITHIN THE MEANING OF PARAGRAPH (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT AND THEREFORE IS NOT ENTITLED TO MAINTAIN A SUIT FOR INJUNCTION TO RESTRAIN RESPONDENT FROM CONSTRUCTING ITS PROPOSED TRACK.

1. Facts in Addition to Those in Petitioner's Brief Necessary to Present the Situation Correctly.

The situation presented by the statement of facts in petitioner's brief (pp. 7-9, 22-23) does not truly depict the situation presented by the record. It is calculated to leave the impression that respondent conceived the idea of constructing its track because of petitioner's application to the Commission for authority to construct its new line and that pending the hearing on petitioner's application, respondent, in an effort to gain an undue advantage, sought to construct an extension of its line without making application to the Com-

mission for a certificate "thus attempting to avoid determination of the question whether its extension is, under the circumstances, warranted by considerations of public convenience and necessity" (petitioner's brief, p. 23). Such is not the case. The record presents an entirely different situation.

Beginning in 1921 the people of San Mateo were desirous of developing that City by locating industries there (R. 231, 232, 241). A number of prospective industries were shown property in San Mateo, particularly the Rose property, with the idea of locating them thereon (R. 232, 241, 242).

These efforts to locate industries in San Mateo were unsuccessful because there were no facilities for switching. So the people of San Mateo insisted that the Southern Pacific (respondent) construct some switching tracks in that section (R. 233). The Southern Pacific had been serving San Mateo since 1863 (R. 126). In 1925 respondent agreed to construct a spur or switch track across the Rose property provided Emma Rose would grant a right of way therefor (R. 140, 233, 234, 241, 242). This, Mr. McCurdy, manager for the Emma Rose property, agreed to do (R. 216). So great was the interest in the construction of switching facilities on the Emma Rose property that a meeting was held in the City Hall of San Mateo in September, 1925, and a committee was appointed to co-operate with the Southern Pacific in constructing such switching facilities on that property (R. 214, 234, 235).

The Emma Rose tract of land consists of about 500 acres (R. 257) situated entirely within the City of San Mateo (Exhibit A attached to defendant's (respondent) answer to amended complaint, R. 28). It abuts appellant's main line right of way for 1907 feet (R. 126). The map contained in the record at page 28 fully shows the situation, the Emma Rose land lying within the City of San Mateo, and respondent's proposed track.

Respondent's original authority for expenditure providing for the construction of this track was dated January 4, 1926, and approved April 29, 1926 (R. 101), more than two years prior to the incorporation of petitioner on July 10, 1928 (R. 2). This authority is a formal document made in compliance with an order of the Interstate Commerce Commission issued in pursuance of Section 19a of the Interstate Commerce Act, paragraph (f) (R. 229, 230). Each authority issued shall describe the change authorized and its location (R. 231). It was impossible for respondent to proceed under this authority because of the failure to get certain paper streets closed and the resulting necessity for changing the place of junction of the spur track with respondent's main line (R. 179, 183).

A revised authority dated November 10, 1927, providing for the spur track in a different location on the Rose property, was approved February 23, 1928 (R. 102). It was necessary to revise this authority again because of a change in length of the track to be con-

structed (R. 183, 184). This second revision of the authority dated August 6, 1928, was approved September 13, 1928 (R. 102). The original authority for expenditure and the revisions thereof, with maps attached, were introduced in evidence as plaintiff's (petitioner here) Exhibit 5 and the original exhibit has been transmitted to this Court.

Each authority provided for the construction of an "Industrial Drill Track," and the authority as finally revised authorized the construction of 8200 feet of drill track on the Emma Rose property to serve that property for its entire width (Exhibit 5). Industrial drill track and switching track are synonymous (R. 249).

By deed dated March 18, 1929, Emma Rose and husband granted respondent the right of way for the industrial drill or spur track (R. 116) and on March 23, 1929, respondent began the construction of this track (R. 5, 16). At that time petitioner had not adopted its resolution of location (R. 287).

At the time of the institution of this suit and at the time of the entry of the decree enjoining respondent from constructing its track, petitioner was without a railroad, without authority from the Commission to construct a railroad, and necessarily without any business to protect. Petitioner (plaintiff in District Court) introduced no evidence showing or tending to show that the construction of respondent's track would injure petitioner in any way, in the event petitioner ever has a railroad and a business.

Counsel for petitioner call attention to the fact that subsequent to the final injunction herein petitioner's proceeding before the Commission was finally determined by the granting of petitioner's application (petitioner's brief, p. 8). Counsel, however, do not call attention to the fact that on March 16, 1931, subsequent to the decision of the Circuit Court of Appeals, upon application of petitioner, the Interstate Commerce Commission entered an order extending the time for the commencement and completion of petitioner's railroad from April 1, 1931, and April 1, 1933, respectively, to July 1, 1931, and July 1, 1933, respectively, and that on June 12, 1931, subsequent to the granting of the writ of certiorari herein, the Commission, upon application of petitioner, again extended the time for the commencement and completion of the construction of petitioner's railroad to January 1, 1932, and January 1, 1934, respectively. Copies of these orders are printed in the Appendix.

2. In Order to Entitle a Party Other Than the Designated Governmental Agencies to Maintain a Suit for Injunction Under Paragraph (20) He Must be Possessed of Some Independent Right of His Own and There Must be an Existing, Impending or Presently Threatened Injury to That Right.

It is the position of counsel for respondent that since paragraph (20) does not define "party in interest", Congress evidently intended that a party to be entitled to maintain the suit for the injunction contemplated by that paragraph must possess those qualifications usually necessary to enable a party to maintain a suit

in equity for an injunction, and the decision of the Circuit Court of Appeals substantially upholds this position. The interest required must be such an interest as is cognizable in equity as a basis for protection by an injunction against existing, impending or presently threatened injury. If petitioner does not possess such an interest, petitioner is not a "party in interest" within the meaning of paragraph (20).

It is an established rule that a court of equity concerns itself only with the protection of property rights, and under this rule it treats any civil right of a pecuniary nature as a property right.

International News Service v. *Associated Press*, 248 U. S. 215, 236;
In re Debs, 158 U. S. 564, 593.

An injunction is issued for the purpose of preventing existing, impending or presently threatened injury.

Connecticut v. *Massachusetts*, 282 U. S. 660, 674;
New Jersey v. *Sargent*, 269 U. S. 328, 331;
Pierce v. *Society of Sisters*, 268 U. S. 510, 536;
Truly v. *Wanzer*, 5 How. 141, 142;
Behre v. *Anchors Ins. Co.*, 297 Fed. 986, 989.

Injunction does not issue because of mere fear or apprehension or against something merely feared as liable to occur at some indefinite time in the future.

Connecticut v. *Massachusetts*, *supra*;
Truly v. *Wanzer*, *supra*;
Behre v. *Anchors Ins. Co.*, *supra*.

Petitioner must show an independent existing right in itself and an existing or presently threatened injury to such right in order to maintain a suit in equity for an injunction.

Sprunt & Son v. *United States*, 281 U. S. 249, 254-257.

Petitioner must base its right to an injunction upon its own rights and not upon a lack of right in respondent.

Edward Hines Yellow Pine Trustees v. *United States*, 263 U. S. 143;

Larimer Ry. Co. v. *Railway Company*, 137 Pa. St. 533.

In *Larimer Railway Co.* v. *Railway Co., supra,* one street railway company filed a bill in equity to restrain another street railway company from constructing its railroad. The court held (p. 547):

> "If, then, the appellants have not, in any way, obtained the consent of the city of Pittsburgh to enter upon these streets for the construction of their road, what standing have they in a court of equity to test the right of the appellees? The consent of the city is a condition precedent to the exercise of their rights under the charter; without this, they have no right, present or prospective, to construct their railway upon the highways of the city, for non constat that this consent will ever be given. It may be that the appellees have no better right; we will decide that question when its arises, but it is plain the appellants have no standing to raise this question for our consideration."

In *Edward Hines Yellow Pine Trustees* v. *United States, supra,* lumber manufacturers and dealers brought suit against the United States to set aside as void an order of the Interstate Commerce Commission requiring carriers to cease and desist, until the further order of the Commission, from collecting a penalty charge of $10.00 per day on lumber held at reconsignment points. In dismissing the bill this Court held (p. 148):

> "But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges."

If petitioner can be said to have any interest at all, it is vague, speculative and unsubstantial. It is very much like the interests involved in *Edward Hines Yellow Pine Trustees* v. *United States, supra,* and in *Pittsburgh & West Virginia Ry.* v. *United States,* 281 U. S. 479.

In the *Hines Case,* in addition to the claim that plaintiffs would be injured as shippers, set up as a basis for an injunction, it was also claimed that the plaintiffs would be injured as a prospective carrier. Plaintiffs were constructing a local railroad which would soon be ready for operation and it was contended that their cars which would move over this railroad to connecting lines would, in the absence of a deterring penalty charge, be used for temporary storage at reconsigning points. In disposing of this claim, this Court said (p. 148):

> "The further claims of plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car stortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief."

In the case at bar, petitioner expects to construct and operate a railroad some time in the future. It fears that the construction of respondent's proposed track will injure it in the future, if it does construct and operate a railroad. If petitioner's fears are realized it will be open to petitioner to apply for injunctive relief, provided, of course, respondent's construction and operation of its track is contrary to law.

In the *Pittsburgh & West Virginia Case, supra,* that railroad brought suit to set aside an order of the Interstate Commerce Commission permitting the Wheeling and Lake Erie Railway Company to abandon its station in the City of Cleveland and to use a union station instead. In endeavoring to show that it had an interest in the matter sufficient to maintain the suit for an injunction, the Pittsburgh contended, among other things, that the Wheeling and Lake Erie and the Pittsburgh had been allocated to one system in the Commission's plan for the consolidation of railroads and that it was seeking to acquire control of the Wheeling. This Court held: "but these vague speculative interests are clearly insufficient to give the Pittsburgh an independent standing in this suit." So lightly did this Court regard these speculative interests of the Pittsburgh that it disposed of them in a foot note.

3. Contention of Petitioner.

The position of counsel for petitioner, on the other hand, is that the proceeding authorized in paragraph (20) "is absolutely devoid of the issues incident to actions in equity, and does not afford the relief to be obtained in such an action"; that "it posessses none of the characteristics of an action in equity in either issues or relief to be obtained", except that the relief is to be in the form of an injunction; that the injunction is granted "solely to prevent violation of an express statutory prohibition enacted by Congress" (petitioner's brief, p. 18); and that the primary purpose of the

injunction provided by paragraph (20) is to "prohibit construction contrary to statutory prohibition, and does not protect nor purport to protect any legal right of a plaintiff" (petitioner's brief, p. 13). Counsel for petitioner admit: *"We have never claimed that petitioner ever had any existing legal right invaded or threatened"* (petitioner's brief, p. 26; emphasis ours).

To uphold petitioner's contention it will be necessary for this Court to decide that it was the intention of Congress, in providing for an injunction in paragraph (20), to subvert the established principles of equity heretofore set out as well as the following:

Threatened commission of an offense against laws of the land is insufficient to call into exercise the injunctive powers of a court. Where, however, a violation of law results in actual or threatened interference with property or rights of a pecuniary nature, equity has jurisdiction to enjoin the violation of law, not primarily to prevent such violation, but to protect property rights.

In re Debs, supra, p. 593.

Counsel for petitioner also contend that it has an actual present interest in maintaining the *status quo,* pending the determination of its application (petitioner's brief, pp. 23, 27). Petitioner may be interested in maintaining the *status quo* until it constructs a railroad, gets a business, and acquires rights such as will give it a standing in a court of equity to apply for an injunction to protect such rights from unlawful inva-

sion to its injury, but that is not the interest necessary under paragraph (20). The interest claimed is like that considered in *City of Lawton* v. *Stevens,* 32 Okla. 476, 122 Pac. 940. In that case the City of Lawton sought an injunction to restrain owners of property from selling any lots or parts of land and from erecting any buildings or changing or modifying or interfering with their land on the ground that the City intended to acquire title to the property by condemnation proceedings for the purpose of protecting and increasing its water supply. The City had attempted to buy the land but an agreement as to price could not be reached. The Court, in affirming a judgment denying an injunction, held (p. 478):

> "But we know of no law that would justify a holding that the proprietor of the fee in lands can be deprived of the right to go on to it, use it, or dispose of it, merely because a corporation, municipal or otherwise, alleges that it will need later to acquire, and at some later, indefinite time will seek to acquire, for its own use, by condemnation proceedings, the title to the land."

In the cited case the City had an interest in maintaining the *status quo* just as petitioner may have an interest in maintaining the *status quo* until it acquires some rights cognizable in equity, but that interest is insufficient to make petitioner a "party in interest" for the purpose of maintaining an injunction suit under paragraph (20).

If respondent's track be an extension as contended by petitioner, the preservation of the *status quo* is unnecessary to protect petitioner. Paragraph (18) prohibits operation of an extension without a certificate from the Commission as well as the construction of an extension without such certificate. If petitioner ever constructs its railroad and respondent is then unlawfully operating its track, petitioner may then institute suit under paragraph (20) to enjoin such unlawful operation.

4. The Construction of "Party in Interest" by the Circuit Court of Appeals Is in Accordance With the Purpose and Policy of Paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act.

In *Low Wah Suey v. Backus,* 225 U. S. 460, 475, this Court held that "all statutes must be given a reasonable construction with a view to effecting the objects and purposes thereof." When the provision of paragraph (20) providing for an injunction is considered in the light of the Congressional purpose and policy underlying paragraphs (18) to (21) of Section 1, it is clear that this injunction proceeding was authorized for the purpose of protecting rights and therefore anyone without existing rights to protect is not a "party in interest." The injunction provision was not authorized for the purpose of prohibiting violations of law but for the purpose of protecting rights in accordance with established principles of equity. The end sought is the protection of rights and the injunction suit is the means provided for obtaining that protection. The

end sought is clearly not the prohibition of violations of the statute.

In *Colorado v. United States,* 271 U. S. 153, 162, this Court held that the certificate required under paragraphs (18) to (20) of Section 1 issues primarily to protect interstate commerce. It also appears from the decision of this Court in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, 277, that the purpose and policy of these paragraphs are to protect the public from burdens and losses resulting from the building of unnecessary lines and from unwarranted competition. In other words, the primary purpose of these paragraphs is to protect the interests and rights of the public with respect to these instrumentalities of interstate commerce.

The provision for an injunction in paragraph (20) is part and parcel of the purpose and policy of Congress as embodied in these several paragraphs and therefore the several paragraphs must be construed as a whole. Since the purpose is primarily to protect the rights of the public, it follows that it was the intention of Congress that the provision for an injunction is primarily for the protection of those rights.

Congress, while providing means whereby the rights of the public might be protected from unnecessary construction and unwarranted competition, also provided secondarily for the protection of the rights of individuals or corporations by authorizing any "party in interest" to maintain a suit for injunction against un-

authorized construction for the purpose of protecting existing rights. There was no intention on the part of Congress to subvert established principles of equity governing injunction proceedings where individuals or corporations, apart from the public, are concerned by authorizing them to maintain suits for injunction where unnecessary to protect rights.

When the provision for an injunction in paragraph (20) is considered in the light of this Congressional policy and purpose, the meaning and scope of the words "party in interest" become clear. If one railroad attempts to construct an unauthorized extension of its line into territory already served by another railroad and thus subjects that railroad to existing or presently threatened injury, the second railroad is a "party in interest" within the meaning of those words as used in paragraph (20) and may maintain a suit in equity to enjoin the unauthorized or unlawful construction.

5. Under the Meaning Attributed to "Party in Interest" by the Circuit Court of Appeals, Statutory Authorization Is Not Surplusage.

Counsel for petitioner argue that if a party in interest must have some independent right of its own which is threatened with injury, such conferring of statutory authority would be wholly unnecessary and pure surplusage (petitioner's brief, p. 13 *et seq.*), since "*A party having an independent legal right of its own* may protect it by injunction when necessary, *without any statutory authorization*" (petitioner's brief, p. 14).

Such an argument affords no basis for the construction proposed by petitioner and has no significance so far as the correctness of the decision of the court below is concerned. It is not unusual for legislative bodies to enact statutes declaratory of the existing rule. Thus, Section 267 of the Judicial Code (U. S. C. A., Tit. 28, Sec. 384) provides:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

In *Scott v. Neely*, 140 U. S. 106, 110, this Court held that this section introduces no new principles of equity jurisprudence, but is merely declaratory of the rule obtaining in equity proceedings from the earliest period in England and always in this country. This is one of the most elementary principles of equity jurisprudence. Also, in *American Foundries v. Tri-City Council*, 257 U. S. 184, this Court in construing Section 20 of the Clayton Act, held (p. 203):

> "It is clear that Congress wished to forbid the use by the Federal Courts of their equity arm to prevent peaceful persuasion by employees, discharged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always. Con-

gress thought it wise to stabilize this rule of action and render it uniform."

It cannot be questioned that the United States under its power to regulate interstate commerce and its obligation to promote the interest of and protect the public in interstate commerce could, without any statutory authorization, maintain a suit for injunction to prevent railroads from constructing unauthorized extensions of line contrary to the purpose and policy of the United States as declared in statutes. In *Sanitary District v. United States,* 266 U. S. 405, 425, 426, this Court held that the United States under its sovereign power to regulate interstate commerce has a standing in a court of equity to remove obstructions to interstate commerce; that the Attorney General by virtue of his office may bring this proceeding; and that no statute is necessary to authorize the suit. See also *In re Debs, supra,* p. 584 *et seq.*

Congress, however, preferring that the Interstate Commerce Commission rather than the Attorney General should be entrusted with the duty of instituting injunction proceedings to protect the public against unauthorized railroads, so provided in paragraph (20). Had Congress provided that suit could be maintained by the Interstate Commerce Commission without making any provision for such a suit by a "party in interest", such a "party in interest" could not maintain a suit for injunction against unauthorized construction even though such a party would be injured by such un-

business and has a standing in a court of equity for injunctive relief against unlawful injury or interference.

Liggett Co. v. Baldridge, 278 U. S. 105, 111;
Truax v. Corrigan, 257 U. S. 312, 327;
Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465.

In *People's Transit Co. v. Henshaw,* 20 F. (2d) 87, 90, certiorari denied, 275 U. S. 553, it was held that receivers operating a street railway system, the revenues of which were directly affected by the operation of bus lines in violation of a city ordinance, have such a property interest as to justify an injunction restraining the bus lines from operating.

The rule followed in *People's Transit Co. v. Henshaw, supra,* has been applied in a number of cases, among which are the following:

Featherstone v. Independent Service Station Association (Tex. Civ. App.), 10 S. W. (2d) 124;
Brooklyn City R. Co. v. Whelan, 199 App. Div. 737, 182 N. Y. Supp. 283, affirmed in 229 N. Y. 570;
Puget Sound Traction Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504;
Memphis Street Railway Co. v. Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635;
N. Y. etc. Ry. Co. v. Deister, 253 Mass. 178, 148 N. E. 590;

Lincoln Traction Co. v. Omaha etc. Co., 108 Neb. 154;

Bartlesville Electric Light & Power Co. v. Bartlesville Interurban R. Co., 26 Okla. 453.

Under the principle applied in these cases, the Texas & Pacific had an independent existing right which it was entitled to protect against unlawful invasion to its injury and it had all the qualifications necessary under established principles of equity to enable it to enjoin the Santa Fe from constructing its railroad and taking away that business to the injury of the Texas & Pacific.

There is nothing in *Pennsylvania Railroad Company v. United States*, 40 F. (2d) 921, to the contrary. That case involved a suit to set aside an order of the Interstate Commerce Commission authorizing another railroad carrier to extend its line into territory then exclusively served by the Pennsylvania. The case was decided in accordance with the familiar principle that, as against the United States, one carrier has no such property interest in its territory and business as would permit it to enjoin another carrier from coming into and serving the same territory under authority from the United States.

The *Pennsylvania Case* has no bearing on the question under consideration.

In the case at bar, the Southern Pacific Company (respondent) is already serving the territory involved. It is seeking to build an industrial spur or switching

track upon a tract of land containing 500 acres immediately adjacent to its main line right of way which constitutes a part of the territory served by it for many years. Petitioner has no right of way, it has no railroad, it has no business, and it does not appear from the record whether it will ever have either a railroad or business. There is no showing that the construction of respondent's proposed industrial spur or switching track will injure petitioner even if petitioner ever builds its railroad and secures a business. In fact counsel for petitioner admit: *"we have never claimed that petitioner ever had any existing legal right invaded or threatened"* (petitioner's brief, p. 26; emphasis ours).

It is argued by counsel for petitioner that "this Court has already defined the term 'any party in interest' as used in an analogous statute (Sec. 212 Judicial Code, now Secs. 44 and 45(a) of Title 28, U. S. C. A., Supp. 1929 thereto) in *Alexander Sprunt & Son, Inc. et al. v. United States, supra"* (petitioner's brief, p. 18). In that case this Court merely held that a competitive advantage enjoyed by the parties was a sufficient interest to enable them to intervene in an administrative proceeding before the Interstate Commerce Commission, and "if they did so, they became entitled under Section 212, Judicial Code, to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission," but that this interest (competitive advantage) alone which was threatened by the order of the Commission was insufficient to entitle them to maintain an inde-

pendent suit to vacate and set aside the order of the Commission.

This case supports respondents' contention that when Congress employed the words "party in interest" in connection with an injunction proceeding, it contemplated that one is a "party in interest" for this purpose only when such party has such an interest as is necessary under established principles of equity jurisprudence to enable the party to maintain an injunction suit. A "party in interest" in an administrative proceeding before the Commission must be one who has such an interest as to entitle him to participate in such administrative proceeding. Under the decision in the cited case a "party in interest" in administrative proceedings does not necessarily have a sufficient interest to make him a "party in interest" in injunction proceedings. The *Sprunt Case* sustains the principle that a party has no standing to maintain an independent suit for an injunction unless some right of his own is being violated resulting in existing or presently threatened injury.

Baltimore & Ohio Railroad Co. et al. v. United States, (Chicago Junction Case), 264 U. S. 258, in no way supports petitioner's construction of "party in interest" as used in paragraph (20). In that case, the Interstate Commerce Commission authorized the New York Central Railroad Company under paragraph (2) of Section 5 of the Interstate Commerce Act to acquire control of the Chicago Junction Railway and the Chicago & Indiana Railroad, terminal railroads

located within the Chicago switching district. Suit was brought by other railroads to enjoin this acquisition. This Court held that carriers are entitled to equality of treatment under the Interstate Commerce Act as fully as shippers; that as a result of this acquisition plaintiffs were subjected to irreparable injury, the loss sustained exceeding $10,000,000; that this loss was not an incident of more effective competition but an injury inflicted by denying to the plaintiffs equality of treatment; and that the plaintiffs, therefore, had the legal interest necessary to entitle them to challenge the order.

In the cited case, plaintiffs, under the law, had a right and this right was being invaded to their injury. Plaintiffs, therefore, had the requisites necessary under equity jurisprudence to enable them to maintain a suit for an injunction. The cited case differs from the case at bar in that in the latter case petitioner has no existing right and it necessarily follows that there can be no injury to a right not in existence.

7. This Court May Consider Subsequent Events in Making Such Disposition of the Case as Justice at This Time May Require.

In *Watts, Watts & Co. v. Unione Austriaca etc.*, 248 U. S. 9, this Court held (p. 21):

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time

require. *Butler v. Eaton,* 141 U. S. 240; *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis,* 224 U. S. 503, 506. And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States v. Hamburg - Amerikanische Packetfahrt - Action Gesellschaft,* 239 U. S. 466, 475, 478; *Berry v. Davis,* 242 U. S. 468; *Crozier v. Krupp,* 224 U. S. 290, 302; *Jones v. Montague,* 194 U. S. 147; *Dinsmore v. Southern Express Co.,* 183 U. S. 115, 120; *Mills v. Green,* 159 U. S. 651; *The Schooner Rachel v. United States,* 6 Cranch 329; *United States v. The Schooner Peggy,* 1 Cranch 103, 109-110."

Subsequent to the decision of the Circuit Court of Appeals and again after this Court had granted a writ of certiorari, the Interstate Commerce Commission, upon application of petitioner, extended the time for the commencement and completion of the construction of petitioner's railroad, finally to January 1, 1932, and to January 1, 1934, respectively. Copies of the Commission's orders are contained in the Appendix hereto.

These subsequent events show that petitioner apparently is not planning to begin the construction of its railroad until nearly three years after respondent began the construction of its spur or switching track on March 23, 1929, and the time of completion is fixed at nearly five years subsequent thereto. The fact that petitioner may have a railroad in the terri-

tory involved in five years after respondent began the construction of its spur or switching track, certainly is not evidence of a sufficient existing interest to make petitioner a "party in interest" within the meaning of those words as used in paragraph (20) of Section 1. It may be that petitioner will secure further extensions of time or not build its railroad at all. These possibilities show the speculative and conjectural nature of petitioner's interest.

It may well be that respondent, by the construction of its spur or switching track, might contribute to the development of this territory during this period of years to such an extent that it would be beneficial to petitioner, rather than detrimental, if petitioner should ever construct its railroad.

These subsequent events serve to emphasize the correctness of the decision of the Circuit Court of Appeals in holding that a corporation, having only a projected line of railroad and an application pending before the Interstate Commerce Commission for a certificate of public convenience and necessity, without a railroad, without a right of way, and without traffic to protect, is not a "party in interest" within the meaning of paragraph (20) of Section 1, so as to be entitled to an injunction. Petitioner's interest is unsubstantial, purely speculative and is based upon hope and expectation rather than upon any right.

It is not an interest cognizable in a court of equity as a basis for an injunction and this Court will not

presume that it was the intention of Congress to make such a speculative and conjectural interest sufficient for the exercise of the equity powers of courts in injunction proceedings.

When paragraph (20) is interpreted in the light of established principles of equity jurisprudence as enunciated in the cases herein cited and in the light of the purpose and policy of paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act, its purpose and meaning are clear. Obviously, it was not the intention of Congress to authorize the use of injunction to prevent violations of law or crimes as such. From the standpoint of crimes or violations of law, paragraphs (18) and (19) are to be enforced by fine or imprisonment or both as provided by paragraph (20). Injunction is to be employed to protect the unlawful invasion of existing rights resulting in injury in accordance with established principles of equity jurisprudence.

The rights to be protected are those of the public in interstate commerce on the one hand and of private individuals on the other. The rights of the public are to be protected by the use of an injunction obtained at the suit of "the United States, the Commission, any commission or regulating body of the State or States affected," while the rights of individuals are to be protected at the suit of "any party in interest," that is, of any party who possesses an existing right which may be

invaded by unauthorized construction or operation to its injury, either existing or presently threatened. A "party in interest" may resort to a court of equity for the protection of its rights and it need not rely on designated agencies of the government to act for its protection. Likewise, the designated agencies of the government may resort to a court of equity to protect public rights and need not wait for a "party in interest" to act for the protection of public rights.

By providing that any "party in interest" may maintain a suit to enjoin unauthorized construction or operation, without further defining "party in interest," Congress has clearly indicated that such "party in interest" must meet the requirements usually necessary, under established principles of equity jurisprudence, to entitle a party to protection by the extraordinary and drastic remedy of injunction. In other words, a "party in interest" must have an existing independent right which is being invaded to its injury, either actual or presently threatened.

Petitioner, without a right of way, without a railroad, and without a business to protect, and without showing that it will be injured by the construction and operation of respondent's track, if it should ever have a railroad and a business, clearly has no right, under settled rules of equity jurisprudence to maintain its suit for an injunction.

Petitioner is not a "party in interest" within the meaning of that term as used in paragraph (20) and

it therefore has no standing in equity to maintain its suit for injunction. The decision of the Circuit Court of Appeals is correct and should be affirmed.

As above stated, the sole ground relied upon by counsel for petitioner in their petition for a writ of certiorari was that the Circuit Court of Appeals erroneously decided that petitioner was not a "party in interest" within the meaning of paragraph (20) of Section 1 of the Interstate Commerce Act.

Under the decisions of this Court, cited on page 4 of this brief, it is within the discretion of this Court to limit its consideration of the case to the ground relied on in the petition for the writ, or the Court may consider and dispose of the entire case. The argument following is intended to acquaint the Court with the merits of the main case in the event the Court exercises its discretion to consider and determine the issues of fact and law involved in the question whether respondent's proposed track is a spur or industrial track, excepted from the jurisdiction of the Interstate Commerce Commission by paragraph (22) of Section 1, or whether it is an extension requiring the approval of the Commission.

authorized construction. In *Payne Lumber Co. v. Neal*, 244 U. S. 459, this Court held (p. 471) that Section 4 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209), in providing for an injunction by the suit of Government officials, impliedly negatived the right of a private person to obtain injunctive relief, even though such private person sustained special injury.

Decorative Stone Co. v. Building Trades Council, 23 F. (2d) 426, 428.

It is clear from these decisions that the statutory authorization is not surplusage so far as a "party in interest" is concerned, even though such "party in interest" must have an independent right of his own which is being invaded to his injury. It is not surplusage so far as the Interstate Commerce Commission is concerned, because in the absence of such statutory authorization the duty of instituting suit for an injunction to protect the public would have rested with the Attorney General. It is not surplusage so far as the state agencies are concerned because the states do not have the power of the United States to protect interstate commerce and they would have been impliedly excluded if they had not been specifically designated.

6. The Decision of the Circuit Court of Appeals is Not in Conflict or Inconsistent With the Decisions of This Court.

Counsel for petitioner contend that the decision rendered by the Circuit Court of Appeals is in conflict with *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa*

Fe Ry. Co., 270 U. S. 266. They argue that "the only injury threatened in that case was a *loss of competitive advantage*" (petitioner's brief, p. 16), and that "The Texas & Pacific Railway Company could *not* have maintained its injunction action under the views expressed by the Circuit Court of Appeals in this case" (petitioner's brief, p. 17). Neither of these contentions is correct.

The *Texas & Pacific Case, supra,* is entirely different from the one at bar. In the cited case the Texas & Pacific Railway was actually serving, under a legal right to do so, the territory involved and it was enjoying a lucrative business therefrom. The Santa Fe was attempting to build an extension of line into the territory served by the Texas & Pacific without securing a certificate of public convenience and necessity, for the purpose of diverting a substantial part of the Texas & Pacific business, necessarily resulting in serious injury to the Texas & Pacific. As against the Santa Fe attempting to serve that territory without compliance with the Act of Congress, but in violation thereof, the Texas & Pacific had a right under the law to that business, it had a property right therein and it was entitled to an injunction against the Santa Fe seeking to invade that right to its injury. This was not a mere competitive advantage enjoyed by the Texas & Pacific but a right to the business as against any other railroad attempting to serve that territory in violation of law.

It is settled that one engaged in a business under a lawful right to do so has a property interest in that

2. Effect to be Given to Special Master's Findings and Conclusions Approved and Affirmed by District Court.

Under Section 240 (a) of the Judicial Code (U. S. C. A. Tit. 28, Sec. 347 (a), which is set out in the Appendix, if this Court considers this phase of the case, it will do so with the same power and authority, and with like effect as if the cause had been brought here by unrestricted appeal.

In *Virginian Railway v. United States*, 272 U. S. 658, this Court held (p. 675):

> "Matters of fact and law are reviewable on appeal in equity."

In *Keller v. Potomac Electric Co.*, 261 U. S. 428, this Court held (p. 447) that in equity procedure:

> "An appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses."

In *Presidio Mining Company v. Overton, et al.*, 270 Fed. 388, 390, Certiorari denied, 256 U. S. 694, the Circuit Court of Appeals for the Ninth Circuit held that upon an appeal in equity, while proper consideration will be given to the findings below, the case is triable *de novo*, especially where the evidence is chiefly documentary and the oral testimony largely uncontradicted. Even

"Where evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight of their testimony, the finding of the trial court is persuasive and presumptively correct, but not conclusive."

In the case at bar, the findings of fact are based upon the pleadings, documents, exhibits, and the uncontradicted testimony of witnesses. It was held in *Presidio Mining Company v. Overton, et al., supra,* (p. 390) that this character of the evidence makes "it the duty of this court to examine the record and find the material facts for itself."

The case at bar presents a situation making it necessary for an appellate court to examine the record and determine the material facts for itself. As above stated, some of the Master's findings of fact which were adopted as those of the District Court, are unsupported by any evidence at all and others are directly contrary to the undisputed evidence, and the Master and Court failed to find certain facts necessary in determining whether the track under construction is an extension or an industrial spur or switching track, notwithstanding the fact that respondent, by exceptions, called attention to the failure to find such facts, and although there is ample evidence in the record to support findings in accordance with respondent's exceptions.

Both the Master and the Court not only misapprehended the evidence but proceeded directly contrary to it, and findings cannot prevail upon clear evidence to the contrary.

3. Statement and Discussion of Facts.

Page 28 of the record is a map showing the general situation. The Emma Rose property is shown lying within the limits of the City of San Mateo and respondent's track is shown leading from its main line of railroad, upon and across the Rose property. It is proposed to construct petitioner's railroad to the east of respondent's railroad and approximately parallel with it (R. 4), that is between respondent's existing railroad and the Bay of San Francisco.

Respondent's authority for expenditure as finally revised, providing for the construction of its track, dated August 6, 1928, and approved September 13, 1928, authorized the construction of 1960 feet of track on the main line right of way (this portion was primarily a facility to the main line operation, R. 164) and 8200 feet of industrial drill track (industrial drill track and switching track are synonymous, R. 249) for the purpose of serving the Emma Rose property for its entire width (Second Revised Authority for Expenditure contained in plaintiff's (petitioner here) Exhibit 5, the original of which has been transmitted to this Court). This track is shown in red on the map attached to the Second Revision of the Authority for Expenditure (plaintiff's Exhibit

5). It is also shown on Exhibit A (R. 28). It was the intention at the time the authority was approved to construct the track of 8200 feet to the extreme eastern boundary of the Rose property, but at the time of the construction it was the intention to construct it only to the San Francisco Bay Toll Bridge Road which was located about 300 feet from the extreme easterly limits of the Rose property (R. 109, 127, 129, 211, 212, 255, and Appendix p. 49 *et seq.*). Mr. Williams, Chief Engineer for plaintiff (petitioner) (R. 82) testified that the survey stakes for the track went to the immediate vicinity of the approach to the toll bridge road (R. 93) and that the survey stakes on the ground indicated a track to the toll bridge road (R. 95). The deed from Emma Rose required the construction of the track only to the southwesterly boundary of the toll bridge road (R. 116). It thus appears that respondent was engaged in the construction of an industrial spur or switching track 7900 feet in length.

Off of respondent's switching track would be a spur, relatively short, but of sufficient length to serve the industry that was proposed to locate or that had located. It would be connected with this switching track at one end by a switch (R. 177). The expense of this short industrial spur is borne largely by the industry (R. 178).

Respondent's track was being constructed in response to a demand from the people of San Mateo, who, having tried to develop their city industrially, found that this could not be done without switching

facilities (R. 231, 232, 241, 242). In developing property industrially switching tracks must be provided first and then industries follow (R. 119, 233, 234). The people of San Mateo insisted that the Southern Pacific (respondent) provide switching facilities (R. 233), and respondent agreed to build a switch track down through the Emma Rose property (R. 234). It is our (respondent's) common procedure to lay down industrial switch tracks at its expense, if the owner of the property which is being developed will contribute the right of way (R. 110). This switch track was being constructed for the sole and exclusive purpose of serving the Rose property consisting of about 500 acres and securing industries on that property (R. 127, 211, 255, 256, Appendix 32, 35, 37).

The territory involved in this proceeding embraces a parcel of land owned by one Emma Rose, containing only about 500 acres (R. 257) lying immediately adjacent to appellant's main line right of way (R. 126) and does not include an area of 23,300 (petitioner's brief, p. 28) acres of new territory not heretofore served by respondent as found by the Master (Appendix 32 *et seq.*). There is in the record evidence (R. 94) that there are 23,300 acres of land and water lying between respondent's railroad on the West and the San Francisco Bay on the East, South San Francisco on the North, and Redwood City on the South, but there is no evidence that respondent's track was being constructed for the purpose of serving that territory. We (respondent) had no expectation of de-

veloping any property adjacent to the Rose property and had not planned or expected to serve or be called upon to serve beyond the Emma Rose property by the Emma Rose industrial switching track (R. 257).

The Emma Rose property is situated within the City of San Mateo (R. 253, Exhibit A, R. 28) and lies immediately adjacent to respondent's main line of railroad, abutting respondent's right of way for a distance of 1907 feet (R. 126), and is a part of the territory served by respondent's railroad since 1863 (R. 126, Appendix 106, *et seq.*). San Mateo, which includes the Emma Rose property, was being served by respondent and by no other common carrier by railroad (Plaintiff's (petitioner here) Exhibit 2, Return to Questionnaire, Question and Answer 11, p. 6, the original of which exhibit has been transmitted to the Court).

In *Western Pacific California Railroad Construction,* 170 I. C. C. 183, the Commission, in granting petitioner authority to construct its proposed railroad, held that all the territory to be served by it was being served by the Southern Pacific Company (respondent). Referring to petitioner's proposed railroad, the Commission said (p. 188):

> "It would serve an area, as stated by the applicant, of about 30,000 acres, in which is a population of some 60,000. This population is now served by the Southern Pacific and includes all the towns on the line of the railroad and all the land

east of the line, much of which is marsh land, and land covered by the shallow water of San Francisco Bay."

Respondent had no intention of extending its track at the easterly end northerly and southerly and approximately parallel with the railroad of petitioner nor in any other direction (Appendix 57 *et seq.*). Mr. Paul Shoup, respondent's president, testified positively and directly that the Southern Pacific Company (respondent) has no intention of extending the track in any direction (R. 211). There is other evidence to the same effect (R. 161, 181) and there is no evidence to the contrary. As above pointed out, the survey stakes on the ground, as found by the Chief Engineer of petitioner, indicated that the track would be built upon and across the Rose property to the southwesterly boundary of the toll bridge road (R. 92, 95) which was 300 feet less than the entire width of the Rose property (R. 109). Respondent does not look for any industrial development outside of the Emma Rose property for a long time to come (R. 123). Notwithstanding this direct and positive evidence to the contrary, the Master found (R. 42) that it was respondent's purpose to extend this track "at the easterly end northerly and southerly and approximately parallel with the railroad of the plaintiff (petitioner)," and counsel for petitioner argue that this finding has sufficient support in the evidence and that "there has been no claim made by respondent that its proposed trackage would not be used for ser-

vice anywhere in the territory involved (referring to the 23,300 acres) in this suit by means of extensions therefrom north or south or in any other direction", (petitioner's brief, p. 31).

Respondent's track was being constructed in accordance with the policy and practice of constructing industrial spurs and switching tracks by respondent and other California carriers, including the Western Pacific Railroad, since 1920 (R. 249, 250, 251, Appendix 93 *et seq.*). Since 1920, the Western Pacific, in addition to constructing other such industrial switching tracks as is involved in this case, built a long track which they considered a spur track, from off their main line just north of the city limits of Stockton, California, swinging around the City of Stockton to the north, to the west and thence turning east and serving the north side of the Stockton Channel. This track is approximately six miles long (R. 250, 251). None of the carriers interested in any of these facilities applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under the provisions of paragraph (18) Section 1, of the Interstate Commerce Act (R. 250). Petitioner is a subsidiary of the Western Pacific (R. 284). In *Western Pacific California Railroad Company Construction, supra,* the Commission, referring to the proposed line of petitioner, said (188):

> "The proposed line is to be built and operated by the new company, a wholly owned subsidiary of the Western Pacific, in order to secure short-

line divisions of through rates, and thus help the parent company bear the burden of the expense of the new construction."

Exhibit L (R. 273) reflects typical industrial switching tracks that have been constructed by Southern Pacific Company (respondent here) subsequent to 1920, without a certificate of authority from the Interstate Commerce Commission (R. 275).

Respondent was attempting to construct its switching track with expedition and without publicity (petitioner's brief, p. 35) because of anticipated opposition from the City Manager of San Mateo (R. 168). Respondent's fears were fully justified, because the City Manager secured an injunction stopping the work, which injunction was based on a misstatement of facts, and after the injunction was issued he sent out his men to make certain alleged facts correct and to construct a sewer line. When these facts were brought to the attention of the Mayor and City Council the injunction of the City of San Mateo was withdrawn (R. 170). Respondent anticipated no opposition from petitioner because respondent thought that a provision in the Emma Rose deed protected petitioner to its satisfaction (R. 149). The deed from Emma Rose, granting right of way to respondent was accepted upon the express condition that respondent would not oppose the crossing of its track by the proposed line of railroad to be constructed by petitioner (R. 139).

The fact that respondent's forces worked on Sunday (petitioner's brief, p. 35) was due to a misunderstanding (R. 151, 152). Mr. Kirkbride, under whose supervision this work was being done, on Monday, March 25, 1929, the day after respondent's forces worked on Sunday, and before petitioner's injunction proceedings were instituted, instructed Mr. Mathews, in charge of respondent's forces, that he did not want any more Sunday work (R. 195).

On page 35 of their brief, counsel for petitioner describe respondent's construction, stating that respondent had laid a track across the Bayshore Highway. There was no Bayshore Highway and the State at that time owned no right of way therefor across the Emma Rose property (R. 280).

Respondent's track was only partially completed at the time of the institution of injunction proceedings (petitioner's brief, p. 35), but this indicates nothing unusual about the construction. Mr. Williams, Chief Engineer for petitioner (R. 83), described respondent's track so far as constructed, but he did not testify and petitioner introduced no evidence that respondent's methods or manner of constructing its track were contrary to good engineering practice. It is significant that, while Mr. Williams described the partially completed track in considerable detail (R. 89 *et seq.*) he did not testify that the construction was at all unusual, considering the necessity for expedition and modern methods of construc-

II.

RESPONDENT'S PROPOSED CONSTRUCTION DOES NOT CONSTITUTE AN EXTENSION OF ITS LINE WITHIN PARAGRAPHS (18) TO (20) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT BUT AN INDUSTRIAL SPUR OR SWITCHING TRACK AS DEFINED BY PARAGRAPH (22) OF SECTION 1 OF THAT ACT AND RESPONDENT IS NOT REQUIRED TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FROM THE INTERSTATE COMMERCE COMMISSION.

1. Statement.

A consideration and determination of the question whether respondent's proposed track is an extension as defined by paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act or an industrial spur or switching track as defined by paragraph (22) of that section involve a number of questions of fact and of law.

The matter was referred to a Special Master to take evidence and report his findings of fact and conclusions of law. A number of the Master's findings of fact which were adopted as those of the District Court do not correctly reflect the evidence contained in the record, and his conclusions of law based thereon are erroneous. Some findings are unsupported by any evidence at all and others are directly contrary to the evidence. Also, the Master and the Court failed to find certain facts material in determining whether the track under construction is an extension or an industrial spur or switching track, although respondent

(defendant) by exceptions, called attention to the failure to find such facts and although there is ample evidence in the record to support findings in accordance with respondent's exceptions.

The action of the District Court in overruling respondent's exceptions and in confirming the Master's erroneous findings of fact and conclusions of law was assigned as error by respondent (appellant) in its appeal to the Circuit Court of Appeals. The questions of both fact and law were discussed fully in the brief filed by respondent in that Court. In that discussion respondent set out fully the Master's findings, respondent's exception thereto and a digest of the evidence showing that the particular finding was contrary to the evidence.

Counsel for respondent will not attempt to discuss fully these questions of fact in the body of this brief. That portion of the brief dealing with such questions of fact filed in the Circuit Court of Appeals is set out in the Appendix hereto as a part of this brief. (The page numbers of this portion of Appendix are the same as in the original brief).

When any fact included in the statement of facts, *infra*, differs from the Master's finding, reference will be made to that portion of the Appendix containing the Master's finding, respondent's exception thereto and a digest of evidence thereunder.

tion. Mr. Williams is an engineer of considerable experience (R. 82) and if there had been anything unusual or contrary to good construction practices, he would undoubtedly have pointed out why and in what respect the methods of construction did not conform to good construction. He merely described the partially completed track in its then existing state without in any way attempting to criticize the methods of construction, leaving it to the uninformed to infer that there was something unusual about the methods of construction.

It may be justly inferred that Mr. Williams was not in a position to combat respondent's evidence that considering the problem involved a very good way was worked out there in connection with building this track (R. 186).

Mammoth Oil Co. v. U. S. 275 U. S. 13, 52.

It was respondent's intention to lay this track on the surface of the ground, pick it up only sufficiently to give it a good running surface until such time as the manager of the Emma Rose property could definitely state the grade line he wanted (R. 150). The deed from Emma Rose granting the right of way for respondent's track (Plaintiff's (petitioner here) Exhibit 7, the original of which has been transmitted to this Court) contains the following provision as a condition (p. 4):

"That the grade or grades of the railroad track or tracks on the parcel of land above described,

and the elevation of said track or tracks shall be such as to best serve the land as it now is for industrial purposes, and the elevation of such track or tracks to be constructed on said parcel of land hereinabove described shall be subject to the approval of the grantors; and in the event the grantors fill their land adjoining said parcel of land above described, the grantee will, upon receipt of written notice from the grantors, raise said track or tracks and fill the parcel of land above described to the same level of the adjoining land of the grantors."

Respondent's track, when constructed, will be operated in the same manner as other industrial tracks, will be used exclusively for switching carload freight from and to industries and will have none of the attributes or characteristics of main or branch lines (109, 123, 128, 248, 254, Appendix 100 *et seq.*)

Respondent's proposed track is to be used for one specific purpose, namely the switching of loaded and empty cars to and from the industries that may locate adjacent to it (R. 109, 123, 124, 128, 175). The service to be given and the manner of giving that service will be as set out in the quotation beginning on page 37 of petitioner's brief.

Obviously this switching service, such as respondent will perform on this track is not the same service in substance as respondent performs over its existing main lines of railroad, counsel's suggestion to the

contrary notwithstanding (petitioner's brief, p. 38). Certainly, there is no evidence or suggestion in the record to that effect.

The net cost of respondent's track, including the 1960 feet of track on respondent's main line right of way, is $73,160 (R. 102), and not $73,160 for 8200 feet of track as appears on page 27 of petitioner's brief. Subsequent to the institution of this injunction proceeding the California Railroad Commission conducted an investigation of the proposed crossing of the proposed State Highway by respondent's spur track (R. 279). The Commission held that, while it could not recognize the mere intention of the State to construct a highway as constituting a public road, it would nevertheless dispose of the matter, since both parties, that is respondent and the Department of Public Works of California, had submitted the matter to the Commission for decision (R. 281, 282). The Commission held that a grade separation could be constructed at a cost ranging between $75,000 and $115,000, (R. 282), one-half of which respondent should pay and the Department of Public Works the other half (R. 284). In its consideration and disposition of the matter, the Commission recognized that respondent was engaged in the construction of a spur track into the Emma Rose property to develop that property for industrial purposes and that respondent's operations over the track would be switching (R. 279-283, inclusive).

The character of the construction of respondent's track conforms to its usual method of constructing spur tracks. The rail was to be second-hand 90-pound rail, released from the main line. It is our (respondent's) policy to wear out the rail in the main line and when it is ready to be removed, it is taken up and used for yard, siding, and spur-track construction (R. 166).

4. Comments on Petitioner's Statement of Facts and Evidence.

On page 31 of petitioner's brief, following the statement that "'There has been no claim by respondent that its proposed trackage would not be used for service anywhere in the territory involved in this suit (meaning 23,300 acres and not 500 acres) by means of extensions therefrom north or south or in any other direction,'' it is stated that "'The general manager (Mr. F. L. Burckhalter) of respondent was entirely frank in his testimony as to the use to which the trackage to be immediately constructed was to be put,'' and there follows several quotations from the evidence contained in the record purporting to sustain this statement as to use of the track to serve 23,300 acres.

Mr. Burckhalter was called as a witness by plaintiff (petitioner) (R. 100) and counsel for petitioner examined him at some length as to the possibility or probability of extending respondent's track for the purpose of serving industries to be located on properties other than the property of Emma Rose. The

speculative nature of this testimony is shown by the quotations included in petitioner's brief on pages 31 to 33, inclusive, as well as by some portions omitted as indicated by stars and some portions not quoted.

On page 32 following "stars" it is stated that "the track that we are discussing (the Rose track) might be turned to the right and serve the property along Brewers Island". The entire statement with respect to Brewers Island is as follows (R. 118):

> "I don't know the property known as Brewers Island except in a very general way. I am not familiar with the name or limits of ownership. As far as I know our company has not been consulted with regard to supplying railroad service for that land. It might have been without my knowledge. The track that we are discussing (the Rose track) might be turned to the right and serve the property along Brewers Island."

Following the quotation ending near the top of page 33 of petitioner's brief, the record contains the following (R. 119):

> "I could not now say just what the limits would be that might or might not be served by this Rose track. I think it is all speculative."

After being lead by counsel for petitioner to speculate as to how and in what manner the proposed switching track on the Rose property might be extended to serve other properties, respondent's general

manager stated the purpose of respondent's switching track (R. 123).

> "Our expectation is that the track will serve industries that may develop on the Emma Rose property."

Then follows the portion quoted in petitioner's brief (p. 33):

> "We do not look for any industrial development outside of the Emma Rose property for a long time to come. If there is industrial development, however, on other properties, we would expect to serve the adjacent properties industrially over this track if that proved to be a convenient and economical way of doing so."

That counsel was leading officers of respondent to speculate as to what might or might not be done with respect to extending respondent's track for the purpose of serving other property as well as the Emma Rose property is shown by the last quotation on page 33 of petitioner's brief from the testimony of Mr. McGanney, Assistant to the Freight Traffic Manager of respondent, who was called as a witness by petitioner (R. 245). The speculative nature is shown more fully by the entire quotation which is as follows (R. 258):

> "If the construction of a deep water terminal should take place my company would expect to serve such terminal or industrial development in whatever manner happened to be the most economical and efficient way of doing it and if the closest piece of track to serve such development

was the Emma Rose track, then that track might be used. *That would have to be determined by the engineering situation.* Whatever appeared to be the most desirable, economic and proper thing to do would probably be done. *I am unable to imagine at this time or to contemplate anything of the sort."* (Italics indicate parts omitted or not quoted.)

The same witness stated the purpose of respondent's track (R. 255, 256):

> "The plan as I have always understood it and heard it discussed was that we would serve the property of the Emma Rose estate and develop it industrially."

His positive testimony shows that there was no intention of developing other property (R. 256):

> "We have no expectation of developing any property adjacent to the Rose property."

It also shows that respondent was not planning to serve other property by its track (R. 257):

> "We have not planned, nor do we expect to serve or be called upon to serve, property beyond the Emma Rose property by the Emma Rose industrial switching track."

Notwithstanding this positive evidence that the track was being constructed for the sole purpose of serving the Rose property and the testimony of Mr. Burckhalter, respondent's general manager, that "it was

proposed to extend this track upon the Rose property to the southerly line of the Toll Bridge Road for the sole and exclusive purpose of developing an industrial area upon the Rose property (R. 127), and the positive testimony of Mr. Shoup, respondent's President, to the same effect (R. 211), counsel for petitioner states (petitioner's brief, p. 34):

> "There was no expression whatever from any Southern Pacific officer or any other person that tended to indicate that it was not the intention of respondent to use the Rose trackage in any way that might be found desirable for the service of industries anywhere within the limits of the territory involved in this action, as such territory was found to be by the Special Master (the territory found by the Special Master to be involved was 23,300 acres)."

Obviously, this conclusion is contrary to direct and positive evidence in the record.

On page 46 of petitioner's brief the Emma Rose property is referred to as extending "miles to the Bay of San Francisco." It is sufficient to say that respondent's 8,200 feet of track would extend from the westerly limits of this property to the extreme easterly limits. By referring to the map contained in the record (R. 28), it will be seen that the 8,200 feet is not a straight line but has a curve in it.

6. Whether Respondent's Track Is an Extension or Not Must be Determined With Reference to the Track Respondent Was Constructing and Not With Reference to the Possibility of Extending This Track.

The position of counsel for petitioner that respondent's track is an extension of line within paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act, is based not upon the fact that the particular track itself is an extension of line but upon the fact that the track plus the possibility of extending it made the switching track an extension of line. It was on this basis or theory that this case was decided in the District Court. In the final decree entered herein by the District Court enjoining respondent from constructing its track the Court refers to the initial 8,200 feet of respondent's proposed track (R. 62).

Counsel for petitioner in their brief (p. 27) refer to "the proposed line of respondent to be immediately constructed would be approximately 8,200 feet in length," and on page 28 reference is made to "the Rose property, to which respondent claimed in the lower Court that its immediate construction would be confined."

On page 34 counsel for petitioner argue:

> "There was no pretense that the authority for expenditure under which this construction was being had forecloses such use, or precluded the construction of any extension thereof under future authorities for expenditure as may be deemed desirable."

Here again counsel deal with the possibility of extension under future authorities.

Undoubtedly respondent's switching track could be extended so that the whole track as extended would constitute an extension of line within the meaning of paragraphs (18) to (20). This question, however, must be determined with reference to the track actually being constructed and not with reference to what additional trackage respondent might or could at some time in the future construct. Its industrial spur or switching track is not made an extension of line because it could possibly be extended at some time in the future so as to become an extension of line. Obviously every industrial spur or switching track could be extended sufficiently to make it an extension of line. It is possible to extend this industrial switching track across the entire United States.

The decision of this Court in *Cleveland, etc. Railway v. United States*, 275 U. S. 404, is authority for the proposition that the possibility of extending an industrial spur or switching track so as to make such industrial spur or switching track an extension of line does not make such industrial spur or switching track an extension of line within the meaning of paragraphs (18) to (21) of Section 1 of the Interstate Commerce Act.

In the cited case a coal company had built a private track about three and one-half miles long from its line to the right of way of the Big Four Railroad. Upon

application by the coal company, the Interstate Commerce Commission ordered the Big Four to construct, maintain and operate the necessary switch connection with the coal company's track, and suit was instituted to enjoin the order of the Commission.

The coal company's track crossed two other railroads at grade and there was an agreement between the two other railroads and the coal company under which trains from these other lines could pass over the track by means of appropriate switch connections which it was physically possible to make and thus tap territory tributary to the Big Four. It was argued that, because of the possibilities of the use of the track by these other carriers, it was an extension within the meaning of paragraph (18) and that the Commission's order was void for non-compliance therewith.

This Court held (p. 410):

> "But no such connection has been made or attempted or threatened; and neither the Illinois Commerce Commission nor the Interstate Commerce Commission has authorized such connection or use. If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of Sec. 1 furnishes the appellant with an appropriate remedy. *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., supra.*"

In the cited case, the possibility of use had materialized to the extent of an agreement under which the

additional use could be realized, but this Court, notwithstanding the agreement, held that no connection had been attempted or threatened, and that the possibility of use did not make the track an extension within the meaning of paragraph (18). Since that paragraph applies to construction as well as to operation (use), obviously the possibility of extension (assuming that construction of respondent's track beyond the Rose property would be an extension) does not make respondent's industrial spur or switching track an extension of its line, and the possibility of extending the spur track so as to make it an extension affords no basis for an injunction restraining respondent from constructing its industrial spur or switching track. If respondent should in the future engage in, attempt, or threaten, such additional construction as would make of its industrial spur or switching track an extension of its line of railroad, petitioner would then, if it had in the meantime acquired sufficient right to make it a party in interest, have an appropriate remedy under paragraph (20) of Section 1.

6. Under the Test Laid Down in the Texas & Pacific Case, 270 U. S. 266, Respondent's Track Does Not Constitute an Extension of Its Line of Railroad Within the Meaning of Paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act But an Industrial Spur or Switching Track Within the Meaning of Paragraph (22) of That Section.

Respondent is not, as suggested by counsel for petitioner (petitioner's brief, p. 52) "attempting to obtain a modification of the views expressed in the *Texas*

& Pacific opinion, which would have the effect of rendering said paragraphs (18) to (21) ineffective to accomplish the purpose of their enactment." Respondent is seeking no modification of the views of this Court as expressed in that case, but respondent is asking this Court to give effect to paragraph (22) of Section 1 in accordance with the intent and purpose of that paragraph. Paragraph (22) provides as follows:

> "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State."

It is respondent's contention that a consideration of the facts in the case at bar in the light of the facts in the *Texas & Pacific Case, supra,* and the principles announced by this Court therein, shows conclusively that this case is governed by the provisions of paragraph (22) and that paragraphs (18) to (20) are inapplicable. This Court held (pp. 277-279):

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning

capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Division Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses.

"When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one State.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover,

the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction."

The sum and substance of the rule announced by this Court in the cited case is that, what was ordinarily an industrial spur or switching track prior to the enactment of paragraphs (18) to (22) inclusive of Section 1 of the Interstate Commerce Act is an extension of a line of railroad under paragraph (18) of Section 1 of that Act if the purpose and effect of the new track is to extend a line of railroad substantially into new territory or into territory already served by another railroad. Stated differently, a track falling within the

classification of industrial spur or switching tracks prior to the enactment of paragraphs (18) to (22) is still an industrial spur or switching track within the meaning of paragraph (22), if the purpose and effect of the track is neither to extend a line of railroad substantially into new territory nor to extend it into territory already served by another carrier.

It cannot be questioned that respondent's track is what was ordinarily an industrial spur or switching track prior to the enactment of paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act. Industrial spur or switching tracks are defined or described in *Associated Jobbers of Los Angeles v. The A. T. & S. F. Ry. Co., et al.* (Los Angeles Switching Cases), 18 I. C. C. 310, by the Interstate Commerce Commission as follows (312):

> "These industry spurs vary in length, some leading directly from the main track into or alongside of the industry served, while others are of a greater length and branch at one or more points, short spurs running off from what is known as a 'lead' to serve other industries in the immediate neighborhood."

This same language was used by this Court in defining and describing industrial spur or switching tracks in the *Los Angeles Switching Case*, 234 U. S. 294, 306, in which case this Court upheld the decision of the Commission.

The tracks in that case varied from one-fifth of a mile to seven miles in length. In this case the length of the industrial spur or switching track, as authorized by the last revision of the authority for expenditure, is 8,200 feet. The track actually being constructed was several hundred feet less than this due to the fact that it was not to be constructed further than the southwesterly boundary of the San Francisco Bay Toll Bridge road.

Respondent's track is an industrial spur or switching track within the definition of the Commission and of this Court, particularly that portion which says "others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to several other industries in the immediate neighborhood." The track which respondent was engaged in constructing was the "lead" or "drill" track from which short spurs are to be built to serve the individual industries locating, or to be located, adjacent to the "lead."

The Commission said further in the *Los Angeles Switching Cases* (p. 313):

> "There are literally hundreds of thousands of such tracks in this country. We have knowledge sufficient on which to base the conclusion that without such industry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroads to develop traffic and facilitate its movement by the

construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple, the sawmill, the factory, the blast furnace, the stone quarry, and the jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility, a shipper's convenience; it is in fact a necessity to both the carrier and the shipper under modern conditions of business and transportation."

The facts in the case at bar show that respondent's track was being constructed in accordance with the policy of railroads referred to by the Commission of building such tracks for the purpose of developing traffic and facilitating its movement. The record in this case also shows that these industrial spurs or switching tracks must be provided before the location of the industries. Industries must be assured of switching facilities prior to location.

Unless therefore the purpose and effect of respondent's track is to extend its line of railroad into territory already served by another carrier, or to extend its line of railroad substantially into new territory, it is not an extension of its line within paragraphs (18) to (20) but it is still an industrial spur or switching track within paragraph (22).

The purpose and effect of respondent's track is not to extend its line substantially into new territory, here-

tofore served by respondent, but to serve industrially the Emma Rose land containing about five hundred acres, which lies immediately adjacent to respondent's main line right of way and which is and has been a part of the territory served by respondent for many years and by no other common carrier by railroad. The record shows that in petitioner's application to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to construct its proposed line, petitioner admitted that San Mateo, of which the Rose property is a part, is served by respondent and by no other common carrier by railroad (plaintiff's (petitioner here) Exhibit 2, Return to Questionnaire, Question and Answer 11, p. 6, the original of which has been transmitted to this Court). Also, in *Western Pacific California Railroad Co. Construction, supra,* in which case the Commission authorized petitioner to construct its proposed railroad, the Commission found (p. 188) that all the population and territory which petitioner proposes to serve was being served by the Southern Pacific Company (respondent). Petitioner has no railroad in the territory in question and it does not appear when, if ever, it will have a railroad in that territory.

A comparison of the facts in the *Texas & Pacific Case, supra,* with those of the case at bar, so far as the track itself is concerned, shows that the track in this case is entirely different from the trackage in the cited case. The findings of the Master in that case are set forth in *Lancaster, et al. v. Gulf, Colorado & Santa*

Fe R. Co., 298 Fed. 488, 492. This report shows that the following trackage was to be constructed (p. 493):

> "The proposed tracks will consist of a main line track, 7½ miles in length, with connections in the nature of a Y at Hale, two storage, assembling, or side tracks at Hale, two side tracks of 1,200 and 1,500 feet in length in the neighborhood of the industries, and five spur tracks connecting this main line with the tracks located at the various industries. The main line, connecting tracks, storage tracks, sidings, and spurs are shown in color on the map marked 'Exhibit 1—Merritt,' filed herewith. The spurs to be constructed by the Santa Fe Railway will connect with existing tracks now owned by the various industries located at their plants."

In the case at bar an industrial spur or switching track less than 8,000 feet in length will be constructed from a connection with appellant's main line upon and across the Emma Rose property to the southwesterly boundary of the San Francisco Bay Toll Bridge Road. From this spur track short individual industrial tracks will be built to the industries to be located adjacent to the industrial spur or switching track. These industrial tracks will be constructed largely at the cost of the individual industry.

Respondent's existing main line of railroad through San Mateo compares with or corresponds to the Santa Fe main line track 7½ miles in length. The industrial spur or switching track to be constructed on the

Emma Rose property compares with or corresponds to the "five spur tracks connecting this main line with the tracks located at the various industries." The individual industrial tracks to be built off of respondent's industrial spur or switching track to the individual industries compares with or corresponds to "the tracks located at the various industries" in that case. Had the Supreme Court been considering only the five spur tracks connecting with the 7½ miles main line of the Santa Fe and not this main line as well, the situation would have been the same as that presented in this case, except that the spur tracks in that case were being built to serve industries already served by the Texas & Pacific, while in this case the spur or switching track is not being built to serve industries already served by another carrier.

A comparison of the facts in the *Texas & Pacific Case* with those of the case at bar, so far as the purpose and effect of the tracks are concerned, shows that the two cases are entirely different. In the cited case the Santa Fe was constructing its track to span the intervening territory for a distance of 7½ miles in order to reach "the richest producing territory in all Texas" which had been developed by the Texas & Pacific and which at that time, and for many years had been, adequately served by the Texas & Pacific. The primary object of this line was to divert from the Texas & Pacific a substantial part of its lucrative business from this rich freight producing territory, and this would necessarily have reduced the earning

capacity of the Texas & Pacific. It is estimated that the Santa Fe would have taken from that road revenues amounting to $600,000 or $700,000 per annum (*Lancaster v. Gulf, Colorado & Santa Fe, supra,* p. 493). The purpose and effect of the Santa Fe trackage was to extend the Santa Fe's line of railroad substantially into new territory and also into territory already served adequately by another carrier.

In the case at bar, respondent was constructing its industrial spur or switching track upon a tract of land containing about 500 acres lying immediately adjacent to its main line, which constituted a part of the territory served by respondent for many years and by no other common carrier by railroad. The purpose and effect of respondent's track was to provide switching facilities, in response to an existing demand therefor, as a means of securing the location of industries upon this property. Experience has shown that these industries would not locate thereon unless the switching facilities were provided in advance of such location.

In *Texas & Pacific Case, supra,* there was involved the building of a line which might have been entirely unnecessary, involving a waste of resources with consequent burden of such waste falling upon the public and the lessening of the earning capacity of another carrier. As pointed out by this Court, that construction involved questions within the railroad policy established by the Transportation Act of 1920 and therefore of national concern. In the case at bar, there

is involved no question of building unnecessary lines involving a waste of resources, and no question of lessening of the earning capacity of another carrier. Respondent's track was merely a local switching facility that must be provided by railroads for the purpose of securing the location of industries adjacent to their rails. As pointed out by the Commission in the *Los Angeles Switching Cases, supra* (p. 313), "there are literally hundreds of thousands of such tracks in this country" and they are "in fact a necessity to both the carrier and the shipper under modern conditions of business and transportation." This track, under the decision of this Court in the *Texas & Pacific Case, supra,* is a matter of local concern and "the question whether the construction should be allowed or compelled depends largely upon local conditions which the State regulating body is peculiarly fitted to appreciate."

If there can be any doubt that respondent's track is an industrial spur or switching track, the following provision contained in the deed from Emma Rose, granting respondent a right of way for its track, should remove all doubt (Exhibit 7, p. 4):

> "That the grade or grades of the railroad track or tracks on the parcel of land above described, and the elevation of said track or tracks shall be such as to best serve the land as it now is for industrial purposes, and the elevation of such track or tracks to be constructed on said parcel of land hereinabove described shall be subject to the approval of the grantors; and in the event the

grantors fill their land adjoining said parcel of land above described, the grantee will, upon receipt of written notice from the grantors, raise said track or tracks and fill the parcel of land above described to the same level of the adjoining land of the grantors."

This provision shows that respondent's track is to be constructed in such a way and upon such grade as will best serve the Emma Rose property industrially and not in such manner as to serve any other territory. If respondent were constructing a main line or a main branch line rather than an industrial spur or switching track it is inconceivable that it would agree that the grade of such track would be subject to the approval of the grantor of the right of way or that respondent, after once having established the grade, would change such grade upon request of the grantor to make such grade conform to the individual requirements of the property of one individual. This provision shows conclusively that the track was being built as an industrial spur or switching track for the development of the Emma Rose property industrially and not as an extension of respondent's line of railroad and is an industrial spur or switching track within the meaning of those words as used in paragraph (22) of Section 1 of the Interstate Commerce Act.

There is nothing in the decision in *Missouri-Pacific R. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 41 F. (2d) 188, certiorari denied 282 U. S. 866 (cited in petitioner's brief, p. 45), which is contrary to re-

spondent's position that its track was not being built into new territory and that its track is an industrial spur or switching track within paragraph (22) of Section 1.

Counsel refer to that case as one "in which the Circuit Court of Appeals of the Eighth Circuit in effect ruled that in a single city there may be territory within 3,700 feet of its rails, adaptable to industrial purposes, reasonably accessible to each of two railroad carriers serving the city, *which is not in fact occupied or served by either,* and that in such event neither can occupy and serve such territory without authorization under said Paragraph (18) to (21)." That case did not so hold either directly or "in effect."

In the case referred to, the Missouri-Pacific was enjoined from extending its line across the tracks of the Rock Island into territory beyond the tracks of the latter road on the ground that it was an extension of line within the meaning of paragraph (18) of Section 1 of the Interstate Commerce Act. The Court held that the evidence in the case established the fact that the territory into which the proposed construction was to be projected was already occupied and served to a very considerable extent by the Rock Island and that it was entirely feasible for the whole territory to be occupied and served by the same railroad company whenever necessary. The Court did not suggest and there is nothing contained in the opinion from which an inference can be drawn that it was the opinion of the Court that it would be necessary for the Rock

Island to secure authority from the Commission to construct industrial spur or switching tracks in this particular territory. The only logical inference that can be drawn from the language of the Court is that the territory involved was a part of the territory of the Rock Island.

CONCLUSION.

Measured by every test which the courts have applied in interpreting and applying paragraphs (18) to (22) of Section 1 of the Act, the track which is the subject of this controversy is clearly shown to be an industrial spur or switching track and its construction and operation are governed by the provisions of paragraph (22).

The proposed trackage does not extend "into new territory" or "into territory not heretofore served" by respondent but, on the contrary, it leads off of its main line right of way onto a tract of land immediately adjacent, which has been served by respondent for many years. It does not "extend into territory already served by any other carrier," as there is no other carrier by rail serving the City of San Mateo.

The construction and operation of respondent's track "is not inimical to the National interest" but is in furtherance of "the railroad policy introduced by the Transportation Act" of "developing and maintaining for the people of the United States an adequate railway system" by improving respondent's

facilities required by shippers already served and supplying facilities to others similarly situated who are desirous of locating their establishments within the same territory and are entitled to like service from respondent. The track will provide an additional facility similar to the "literally hundreds of thousands of such tracks in this country."

There is no evidence in the record showing that it was the intention or plan of respondent to extend its track beyond the boundaries of the 500 acre tract which this track will serve, and therefore there will be no invasion by the proposed construction of territory adequately or at all served by any other carrier.

The mere possibility of respondent extending its track beyond the boundaries of the Rose tract does not justify the application of any other test or "guide" than has been applied by the courts.

The National policy surely did not contemplate that industrial territory ing immediately adjacent to a carrier's main line and in the immediate vicinity of industries already served by existing spurs should remain undeveloped industrially. By the adoption of paragraph (22), Congress manifested its policy of rendering it possible for carriers to provide conveniently and expeditiously facilities required by shippers already served by "literally hundreds of thousands of such tracks in this country" and other shippers desirous of having the same service. The magnitude of such construction is forcibly called to attention by the fact that at the time this controversy

arose respondent had under construction over 200 tracks of similar character (R. 152).

There would be a serious interference with the commerce of the United States were the carriers obliged to obtain the Commission's sanction before constructing industrial spurs which this Court has held are, in a real sense, railroad terminals and the commerce of the country would suffer if the carriers, in the discharge of their duty, were not free to anticipate the requirements of shippers and install these facilities expeditiously.

The decree of the District Court entered on February 28, 1930, granting petitioner an injunction restraining respondent from completing the construction of its partially completed track and operating it after completion is erroneous and should be reversed.

Respectfully submitted,

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Dated: San Francisco, California.
October 12, 1931.

(APPENDIX FOLLOWS.)

APPENDIX.

STATUTES RELIED UPON.

Paragraphs (18), (19), (20), and (22) of Section 1 of the Interstate Commerce Act (U. S. Code, Ann., Title 49, Section 1, Paragraphs (18), (19), (20), and (22)), contained in the Transportation Act of 1920, are as follows:

Paragraph (18). After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Paragraph (19). The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Paragraph (20). The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before,

the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Paragraph (22). The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Section 240, Sub. (a), of the Judicial Code, (U. S. Code, Ann., Title 28, Section 347, Sub. (a)), is as follows:

> Section 347. Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

FIRST ORDER OF COMMISSION EXTENDING TIME FOR COMMENCEMENT AND COMPLETION OF PETITIONER'S RAILROAD.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 16th day of March, A. D. 1931.

Finance Docket No. 7025

WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY CONSTRUCTION

Finance Docket No. 7364

WESTERN PACIFIC RAILROAD COMPANY ACQUISITION AND OPERATION

It appearing, That on January 19, 1931, the Commission by Division 4, issued its report and certificate in the above-entitled proceedings authorizing, among other things, the Western Pacific California Railroad Company to construct a line of railroad between San Francisco and Niles, Calif., upon condition that such construction should be commenced on or before April 1, 1931, and completed on or before April 1, 1933.

It further appearing, That, for good cause shown, the Western Pacific California Railroad Company will be unable to commence and complete the construction

of the line of railroad authorized in Finance Docket No. 7025 within the time prescribed in the certificate issued therein, and has filed its petition for an extension of time to July 1, 1931, and July 1, 1933, within which to commence and complete the construction of said line of railroad.

It is ordered, That the time prescribed in the certificate in Finance Docket No. 7025 within which the Western Pacific California Railroad Company shall commence and complete the construction of the line of railroad therein authorized be, and it is hereby, extended to July 1, 1931, and July 1, 1933, respectively.

By the commission, division 4.

GEORGE B. MCGINTY.

SECOND ORDER OF COMMISSION EXTENDING TIME FOR COMMENCEMENT AND COMPLETION OF PETITIONER'S RAILROAD.

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 12th day of June, A. D. 1931.

Finance Docket No. 7025
WESTERN PACIFIC CALIFORNIA RAILROAD COMPANY
CONSTRUCTION

Finance Docket No. 7364
WESTERN PACIFIC RAILROAD COMPANY ACQUISITION AND OPERATION

It appearing, That on January 19, 1931, the Commission, by Division 4, issued its report and certificate in the above-entitled proceedings authorizing, among other things, the Western Pacific California Railroad Company to construct a line of railroad between San Francisco and Niles, Calif., upon condition that such construction should be commenced on or before April 1, 1931, and completed on or before April 1, 1933.

It further appearing, That by order entered March 16, 1931, the time for commencing and completing said construction was extended to July 1, 1931, and July 1, 1933, respectively.

It further appearing, That, for good cause shown, the Western Pacific California Railroad Company will be unable to commence and complete the construction of the line of railroad authorized in Finance Docket No. 7025 within the time prescribed in the certificate, as extended, and has filed its petition for an extension of time to January 1, 1932, and January 1, 1934, within which to commence and complete the construction of said line of railroad.

It is ordered, That the time prescribed in the certificate in Finance Docket No. 7025 within which the Western Pacific California Railroad Company shall commence and complete the construction of the line of railroad therein authorized, be, and it is hereby, further extended to January 1, 1932, and January 1, 1934, respectively.

By the commission, division 4.

GEORGE B. MCGINTY,

(Seal) *Secretary.*

ARGUMENT ON THE FACTS CONTAINED IN BRIEF FILED IN CIRCUIT COURT OF APPEALS.

II.

THE TERRITORY INVOLVED IN THIS PROCEEDING EMBRACES A PARCEL OF LAND OWNED BY ONE EMMA BOSE CONTAINING ONLY ABOUT 500 ACRES LYING IMMEDIATELY ADJACENT TO APPELLANT'S MAIN LINE RIGHT OF WAY WHICH HAS HERETOFORE BEEN SERVED BY APPELLANT, WHICH IS NOT NEW TERRITORY AND DOES NOT INCLUDE AN AREA OF 23,300 ACRES OF NEW TERRITORY NOT HERETOFORE SERVED BY APPELLANT'S RAILROAD, AS FOUND BY THE MASTER.

The Master's finding of fact No. 7 (R. 38), which was adopted as that of the Court, is as follows:

> "7. The territory involved in the present proceeding is in San Mateo County, bounded on the east by the deep-water channel of San Francisco Bay, on the north by an east and west line running through South San Francisco, and the south by an approximate line which runs through Red-

wood City, and on the west by the Bay Shore Highway. There are approximately 23,300 acres in this area, 7,200 of which lie between South San Francisco and Steinberger Creek, which are immediately available for industrial occupation. Farther to the south between Steinberger Creek and Redwood City there are approximately 3,400 acres of land which may, with some reclamation, be made available for industrial use. The territory just above described is desirable for industrial projects. (Plaintiff's Ex. 2, maps 85 and 86.) Said territory is new territory which has not heretofore been served by the defendant railroad."

Appellant's exception (R. 47) thereto is as follows:

"(2) Defendant excepts to finding No. 7 upon the ground that said finding is contrary to the evidence because the territory involved is not as specified in said finding but is only that certain piece or parcel of land owned and held in a single ownership by one Emma Rose, embracing not more than 500 acres which is not new territory and which has heretofore been served by defendant, and because the territory described in said finding No. 7, except said 500 acres, is not immediately available for industrial occupation and that the territory last described in said finding is not desirable for industrial projects."

The Master's finding is presumably predicated upon the testimony of Mr. Williams, Chief Engineer for appellee, and for the Western Pacific Railroad Company (R. 82) who testified:

Easterly of the shore of the bay there is a great area of land now submerged that can be reclaimed by the construction of a bulkhead along the channel line and the filling in of that area. The bulkhead line has not as yet been established by the United States in that vicinity, but it unquestionably will be established well out from the shore, and presumably somewhere in the vicinity of the westerly channel line. The total area east of the Bay Shore highway between South San Francisco and Redwood Creek and west of the probable location of a bulkhead line along the westerly side of the deep water channel that will ultimately be available for industrial purposes, would be approximately 23,300 acres (R. 94). Of this total area of 23,300 acres approximately 7,520 acres are ashore or reclaimed and immediately available for industrial occupation (R. 94).

He further testified that he saw no reason why appellant's proposed track could not be extended to serve the entire area now reclaimed and that may be reclaimed in the future up to South San Francisco and likewise that it could be extended along substantially the same lines as appellee's proposed railroad to serve this area down as far as Redwood Creek (R. 95).

This testimony undoubtedly shows that there are approximately 23,300 acres of land and water, largely water, lying east of the Bayshore Highway between South San Francisco and Redwood Creek and west

of the probable location of the bulkhead line along the westerly side of the deep water channel but it does not prove that the 23,300 acres are involved in this proceeding and there is no other evidence in the record to prove that that area is involved.

The evidence introduced by officers of appellant and the evidence of disinterested parties show conclusively and without contradiction that the area involved in this proceeding is limited to the land owned by Emma Rose embracing approximately 500 acres lying immediately adjacent to appellant's main line of railroad.

Mr. Burkhalter, General Manager of appellant, called as a witness by appellee (R. 100), testified: The Rose property abuts the right of way of the Southern Pacific Company for a distance of 1907 feet (R. 126). It is proposed to extend this track upon the Rose property for the sole and exclusive purpose of developing an industrial area upon the Rose property (R. 127). Our expectation is that the track will serve industries that may develop on the Emma Rose property. We do not look for any industrial development outside of the Emma Rose property for a long time to come (R. 123). The property outside of Emma Rose property will probably not be developed until after the Emma Rose property is developed (R. 108). We have no plans at this time for serving the territory that commences at the end of appellant's proposed track and extends from there

to San Mateo Point (R. 109). I know of no plans by our company to serve the property of the San Mateo Docks Company (R. 114). As far as I know our company has not been consulted with regard to supplying railroad service for the property known as Brewers Island (R. 118).

The country to the north and east of this Toll Bridge Road is marsh land and water principally on the east, and to the north of the Rose property, and is not at all as suitable for industrial development as the Emma Rose property because it requires filling in before it would be equally as useful as the Rose property. There is not any possibility of developing that property for industrial purposes in the immediate future (R. 127).

Mr. Kirkbride, Engineer of Maintenance of Way and Structures of appellant, called as a witness by appellee (R. 136) testified: If a large industry wished to locate in the immediate vicinity of this track over the Rose property, but off of the Rose property, I would present the proposition as an entirely new project to the management and abide by their decision (R. 161).

Mr. Paul Shoup, President of appellant, called as a witness by appellee (R. 197, testified): My company has a comprehensive policy for the supplying of railroad service with respect to what is known as the Rose property lying directly east of San Mateo. With the exception of that property we have no plan

at all (R. 198). The purpose which the Southern Pacific Railroad Company sought to accomplish by constructing the track under construction was to serve these 500 or 600 acres lying east of San Mateo with this industry track and to secure industries on that property. The Southern Pacific Company has no intention of extending the track in any direction. (R. 211).

Mr. Frye, a representative of the Freight Traffic Department of appellant at the time of the hearing but prior thereto Industrial Agent for appellant (R. 240), who conducted negotiations commencing in 1921 looking to the construction of this track (R. 241) and who initiated the project for serving the Rose property (R. 244), called as a witness by appellee (R. 240), testified: The only property that seemed desirable at that time (1921) was the Emma Rose property because it was higher and harder than the other property. I was authorized by my company to go ahead and tell these people (of San Mateo) that we would lay a track at the Emma Rose property so that we could develop the property industrially (R. 241). As a representative of my company I never contemplated the extension of any tracks down to deep water on the easterly side of the Emma Rose property. I was devoting my time to something that we could make use of (R. 242). What I was seeking to do in San Mateo was to develop that high land which in this case was owned, as I understood it, by the Emma Rose Estate (R. 244).

Mr. McGanney, Assistant to the Freight Traffic Manager of appellant, 18 years in appellant's service, called as a witness by appellee (R. 245), testified: I know that Mr. Frye was authorized to get up and work out a plan for the industrial development of the Emma Rose property. Such matters were a part of my particular duty (R. 247). The plan as I have always understood it and heard it discussed, was that we would serve the property of the Emma Rose estate and develop it industrially (R. 255, 256). We have no expectation of developing property adjacent to the Rose property. We have not planned nor do we expect to serve or be called upon to serve property beyond the Emma Rose property by the Emma Rose industrial switching track (R. 257).

Mr. Dawson, Assistant Division Engineer on the Coast Division of appellant (R. 260) between November 1, 1923 and July 1, 1928, who participated in the negotiations leading up to the construction of the proposed track (R. 261), called as a witness by appellant, testified: I attended a meeting in the City Hall at San Mateo in September 1925, at which there was a general discussion about the desirability of asking industries to San Mateo and particularly taking steps to locate industries on the Rose property (R. 261, 262). A committee was appointed to endeavor to work out details for making available the Rose property for industrial purposes (R. 262).

The evidence given by the officers of appellant was fully corroborated by the testimony of other witnesses.

Mr. Imboden, who was general manager of the Mercantile Building and Loan Association at the time of the hearing, and manager of the Tri-Cities Chamber of Commerce during the years 1921 to 1926 (R. 231), called as a witness for appellant, testified: I was acting quite a bit in that capacity with the development of property in the vicinity of San Mateo during the years 1921 to 1926 (R. 231). I had to do with locating or providing facilities for industries on the property known as the "Emma Rose Tract" (R. 232). We wanted to develop that whole section intensively from an industrial standpoint and tried to get the Southern Pacific to agree, at least the Chamber of Commerce did, to go further than through the Emma Rose property, but Mr. Frye who represented the Southern Pacific would not acquiesce in our request (R. 235). We could not make much progress in the development of San Mateo and that vicinity industrially because there were no facilities for switching. We always ran into a brick wall; if there are no industries there are no facilities for switching. That was the proposition. So we insisted upon the Southern Pacific Company constructing some switch tracks in that section and finally sold the idea to them and they agreed that you could hardly expect people to go there with light industries or heavy industries without having some switch track facilities (R. 233). They agreed

to construct a switch track down through the Emma Rose property (R. 234). We wanted them to come right out to deep water and always talked that but Mr. Frye never could see it (R. 235). Mr. Frye would never acquiesce in our request to develop farther out. The development he wanted was limited to the Emma Rose tract. I would have been the first to have jumped at it if we could have gotten him to agree to do it. Personally I was also trying to get trackage out to industries I was seeking to locate on deep water (R. 236). It was a part of my regular duties to locate industries out on deep water and east of the Rose properties (R. 238). Mr. Frye, as I understood it, agreed that the Southern Pacific Company would construct a switch track through the Emma Rose property at the expense of the Southern Pacific Railroad to go down 11th Street to the end of the Emma Rose line (R. 239).

The testimony of these witnesses is fully corroborated and sustained by documentary evidence which is conclusive upon this question. This evidence consists of maps filed as exhibits in this case, hereafter referred to, and the authority for expenditure and the two revisions thereof, under the authority of which the construction of the track was undertaken.

The authority for expenditure is a formal document or instrument approved and issued by the management authorizing the construction of the track in question. As pointed out in specification of error No.

12 the original authority for expenditure in this case and the two revisions thereof were made in compliance with the provisions of Valuation Order No. 3, which was issued by the Interstate Commerce Commission in pursuance of Section 19a of the Interstate Commerce Act (R. 229, 230). Order No. 3 provides that "carriers shall issue an Authority for Expenditure for each change in their property" and "each Authority issued shall describe the change authorized and its location" (R. 231). The authorities in question, in conformity with the regulations of the Commission, show that the *authorized* track is limited to the Emma Rose land. Under the authority and the two revisions appellant could do less than authorized thereby (R. 131, 164, 212) but it could not do more (R. 181). The original authority for expenditure and the two revisions thereof, with the maps attached, were introduced in evidence as plaintiff's Exhibit 5 and the original exhibit has been transmitted to this Court by order of the District Court.

The original authority is dated January 4, 1926, and approved April 29, 1926; the first revision is dated November 10, 1927, and approved February 23, 1928; and the second revision is dated August 6, 1928, and approved September 13, 1928.

These two revisions of the original authority for expenditure show the care observed by appellant in complying with the requirements of the Commission's Valuation Order No. 3. The first revision was made

necessary because of the impossibility of proceeding under the original authority by reason of the failure to get certain paper streets closed and the necessity for changing the place of junction of appellant's track with its main line (R. 179, 183). The second revision was made necessary because of a change in the length of the track to be constructed and the necessity of building a cooling tower for the Leslie Salt Company to secure a right of way over a corner of the Salt Company's property (R. 183, plaintiff's Exhibit 5, second revision of the authority for expenditure). These revisions were essential under the Commission's regulations in order to have the authority for expenditure correctly "describe the change authorized and its location" (R. 231).

The map attached to the original authority for expenditure is entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property" and the authorized industrial trackage shown by a red line extends into the Emma Rose property only a short distance beyond the Bay View Boulevard (shown on map referred to). The authority itself contains a statement that "tracks now proposed will serve about 36 acres of industrial property". If there were any question as to what was meant by this it is sufficiently cleared up by the statement contained in the first revision of this authority as follows "GMO 68280 was authorized to construct 5475 feet of 90# drill track to serve some 36 acres of industrial property owned by Mrs. Emma Rose be-

tween our main track and the Bay, in the vicinity of our Leslie Station", and "It is now proposed to construct a drill track 3850 feet long, parallel to and on the bay side of the main track. From this drill track, just outside of the limits of this subdivision, it is proposed to construct 4160 feet of drill track extending toward the bay to serve the property". The map attached to this first revision is dated November 10, 1927, and is entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property". The authorized industrial trackage is shown by a red line on the map attached to the authority and it extends into the Emma Rose property for about one-half the distance to the easterly limits.

The second and last revision of the authority for expenditure contains the following statement: "GMO 68280 (revised) was authorized to construct 3850 feet of drill track parallel to main and 4160 feet of track extending toward the bay to serve property owned by Mrs. Emma Rose, between our main tracks and San Francisco Bay, in vicinity of Leslie Station" and "GMO-68280 (revised) did not provide for extending the track across the entire Rose Estate. It is now proposed to construct 1960 feet of track parallel to main and 8200 feet of track extending toward bay to serve the property for its entire width". That refers to the Emma Rose property (R. 102). The map attached to this authority is dated February 10, 1928, and is entitled "Southern Pacific Company, Pa-

cific Lines Proposed Ultimate Development Emma Rose Property San Mateo Leslie".

The track to be constructed is shown by a red line which extends the entire length or width of the Rose property. The outer end of the red line is co-incident with the limits of the Emma Rose property (R. 105).

Plaintiff's Exhibit 19 (original of which has been transmitted to this Court under order of the District Court) is a Southern Pacific Company map dated October 20, 1925, entitled "Southern Pacific Co. San Mateo Leslie Possible Industrial Development Emma Rose Property".

Plaintiff's Exhibit 22 (original of which has been transmitted to this Court under order of the District Court) is another Southern Pacific map dated October 20, 1925 (Revised 10-26-25, 12-9-25, 12-11-25), entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property".

Plaintiff's Exhibit 23 (original of which has been transmitted to this Court under order of District Court) is another Southern Pacific map dated October 20, 1925 (revised October 26, 1925), entitled "Southern Pacific Co. San Mateo-Leslie Possible Industrial Development Emma Rose Property".

Plaintiff's Exhibit 24 (original of which has been transmitted to this Court under order of District Court) is another Southern Pacific Company map dated October 20, 1925 (revised 10-26-25, 12-9-25,

12-11-25, Sept. 13, 1927), entitled "Southern Pacific Co. San Mateo-Leslie Proposed Industrial Development Emma Rose Property".

The original and first and second revisions of the authority for expenditure made in conformity with the requirements of the Interstate Commerce Commission and without any reference whatsoever to any proposed line of railroad which appellee subsequently proposed to construct have, as we have hereinbefore stated, furnished conclusive evidence defining the territory involved in the proceeding.

As we have heretofore shown, appellant could not construct tracks in addition to those authorized without violating the rules which have been prescribed by the Interstate Commerce Commission and the fact that these authorities for expenditure refer to future plans or ultimate future development should be entirely disregarded in determining this question. Apart from this, however, the second revision of the authority for expenditure shows that appellant had no intention at that time of constructing any track other than that on the Rose property and that upon its main line right of way.

The original authority for expenditure provides: "Tracks now proposed will serve about 36 acres of industrial property and track proposed under future plans will serve an unlimited territory extending clear to the Bay", and "Improvement and restrictions force the location to this point on property owned by

Mrs. Emma Rose who, through representative, has agreed to contribution of a 50-foot right of way over her property for a drill track and to assist in procuring similar right of way for a future extension of a proposed drill track from her easterly property line to deep water channel". Also the map attached to this authority has green lines showing "ultimate industrial development". Extending from the red line, representing authorized industrial trackage, a green line, indicating proposed future trackage, is shown running clear out to the Bay. The first revision of this authority also contains the following: "The Rose Estate will donate a 50 foot strip of right of way for ultimate extension of this track and assist in procuring other rights of way."

The map attached to the first revision also contains a green line showing "Future Track" extending clear out to the Bay.

Mr. Dawson, under whose directions these two maps were prepared, testified: The green line represents *possible* industrial development. In a way it was a dream. It was shown to meet the request of the representatives of the Chamber of Commerce to show possibilities of industrial development beyond the limits of the Rose property (R. 265, 266).

Mr. Imboden, Secretary of the Three-Cities Chamber of Commerce, testified: We wanted the Southern Pacific to come right out to deep water. We always talked that, but Frye could never see it (R. 235).

Mr. McCurdy, Manager of the Rose Estate, testified: There was some discussion as to running an industrial track in the approximate location shown as extending from the Southern Pacific Railroad easterly clear out to the right hand side of the map (that is as shown by the green line) (R. 219). We made no effort to assist the railroad in getting any right of way out easterly over any other property except the Rose property. I do recollect, in accordance with the statement in the authority for expenditure that I told the Southern Pacific Company that I would assist them in so far as we could in procuring similar rights of way for a further extension of a drill track across the Rose property but I did not take any action personally. We did not get that far (R. 220).

Whatever may have been the intention with respect to ultimate development at the time the original authority and the first revision and the maps attached to them were prepared, there was no such *intention* at the time the second revision and the map attached thereto was prepared. The map attached to the second revision is dated February 10, 1928, five months before appellee was incorporated, and the authorized track shown by the red line extends from the Southern Pacific main line out to the easterly limits of the Rose property. On this map also the "ultimate development" is shown by a green line. This "ultimate development" is limited to the building of additional trackage on the main line right of way of appellant.

In other words, the intention of the Southern Pacific Company, as finally expressed, in the second and last revision of the authority for expenditure, under which the construction was being done, is to build a track to serve the Emma Rose property industrially and that property is therefore the only area involved in this proceeding.

The Master's finding that "said territory is new territory which has not heretofore been served by the defendant railroad" refers to the 23,300 acres erroneously found by the Master to be the territory involved in this proceeding. There is no finding that the Emma Rose property alone consisting of only 500 acres of land immediately adjacent to appellant's main line right of way is new territory not heretofore served by appellant. The Emma Rose property is not new territory but is a part of the territory being served by appellant's railroad and by no other common carrier by railroad. This is fully shown under XI, *infra*.

III.

APPELLANT INTENDED TO CONSTRUCT A TRACK EXTENDING ONLY AS FAR FROM ITS MAIN LINE TRACK AS THE SOUTHWESTERLY LINE OF THE SAN FRANCISCO BAY TOLL BRIDGE RIGHT OF WAY, AS REQUIRED BY THE DEED EXECUTED BY EMMA ROSE, GRANTING APPELLANT A RIGHT OF WAY OVER 500 ACRES OF LAND IMMEDIATELY ADJACENT TO ITS MAIN LINE RIGHT OF WAY, FOR THE PURPOSE OF SERVING THIS LAND SOLELY AND EXCLUSIVELY, AND APPELLANT DID NOT PLAN TO SERVE AN UNLIMITED TERRITORY EXTENDING TO THE BAY OF SAN FRANCISCO OR ANY OTHER TERRITORY EXCEPT THIS LAND.

The Master's finding of fact No. 11 (R. 40), which was adopted as that of the Court (R. 58), is as follows:

> "11. The defendant proposed to construct a line of track extending at least as far from its main track as what is called the Toll Bridge Highway, but the plan of the defendant company, as evidenced by the authorities for expenditures, was to serve an unlimited territory extending to the Bay of San Francisco. Although defendant obtained from the owners of what is known as the Emma Rose property a right of way to the extreme easterly edge of the Emma Rose property in order to serve that property, defendant obtained a right of way from 40 to 50 feet in width, whereas, for industrial spurs, usually, the right of way is only 17 feet."

Appellant's exception (R. 47) to finding No. 11 is as follows:

"(3) Defendant excepts to finding No. 11 because the Master should have found, but failed to find from the undisputed evidence, that the defendant proposed to construct a track extending only as far from its main track as what is called the southwesterly line of the right of way of the San Francisco Bay Toll Bridge Highway and that the deed granting defendant its right of way over and across the land of Emma Rose expressly requires defendant to construct it said track only 'in a northeasterly direction to the southwesterly boundary of the San Francisco Bay Toll Bridge Company's right of way' and that the grade or grades of the railroad tracks upon said land and the elevation of said tracks 'shall be such as best serve the land as it is now for industrial purposes,' and the elevation of such track to be constructed on said land shall be subject to the approval of the grantors; and that the plan of defendant, as evidenced by its authorities for expenditure and uncontradicted evidence of its witnesses was, solely and exclusively, to serve the property of one Emma Rose consisting of approximately 500 acres lying between the main line railroad of defendant and what is called the Toll Bridge Highway, instead of finding that the defendant proposed to construct a line of track extending at least as far from its main track as what is called the Toll Bridge Highway and that the plan of defendant company, as evidenced by the authorities for expenditure, was to serve an

unlimited territory extending to the Bay of San Francisco,' and because in connection with the said finding the Master should have found, but failed to find, that it was necessary for defendant to acquire a right of way from 40 to 50 feet wide in order to provide a borrowpit to enable defendant to raise its said track as required by said deed granting it a right of way across said Emma Rose land."

As heretofore pointed out the map attached to the second revision of the authority for expenditure (plaintiff's Exhibit 5) shows the authorized track as extending beyond the San Francisco Bay Toll Bridge Road to the extreme easterly limits of the Rose property. The distance beyond the highway is perhaps about 300 or 400 feet (R. 109). It should be borne in mind, however, that the fact that the authority for expenditure authorized the construction of the track across the highway did not necessarily mean that it had to be constructed.

Mr. Paul Shoup testified: We don't always follow the authority rigidly that may be granted, because new problems come up, and they may have some new ideas, the officers, as to changes in plans—any of our officers, and sometimes I develop some of my own. We do not have to spend all the money we are authorized to spend (R. 212).

Mr. Burckhalter testified: When an authority is issued the officers handling the matter are privileged

to use their judgment, conferring with their superiors if necessary as to whether they will use all the expenditure or not (R. 131).

Mr. Kirkbride testified: The construction of the track in controversy fell within my jurisdiction, and after it had been authorized in the formal way, which has been outlined here in the testimony heretofore given, it became my duty to construct it, and to see that it was constructed expeditiously and reported completed. I could work out the engineering difficulties of location and construction, not extending the original authority or exceeding the appropriation, but to modify it within the limits thereof. That is the authority generally invested in me in constructing all similar facilities (R. 164).

The deed from Emma Rose and husband to the Southern Pacific Railroad Company, dated March 18, 1929, plaintiff's Exhibit No. 7 (original of which has been transmitted to this Court under order of District Court) provide (p. 4) "that Grantee shall construct at its sole cost and expense and have ready for operation in six (6) months from date hereof a single railroad track upon parcels Nos. 1 and 2 hereinabove described, connecting with the main track of the Grantee's near Leslie Station, San Mateo County, California, and extending from the connection of said main track in a northeasterly direction to the southwesterly boundary of the San Francisco Bay Toll Bridge Company's right of way."

Mr. Kirkbride, on cross-examination, testified as to the reason for including that provision in the deed and for not constructing the track beyond the toll bridge road: In the preparation of the detail in connection with the Emma Rose agreement and deed, the question arose as to this new toll bridge highway that had just been completed across the Emma Rose property. My recollection is that it was completed about March, 1929. It was represented to me that it was a fill possibly ten feet above the natural surface of the ground, very close to the point where the highway had been elevated to go over Seal Creek, which was a navigable stream. It was furthermore represented to me that there was a large artificial borrow-pit or canal, on the southwesterly side of the toll road, and that the waters of the bay were very close to the embankment on the other side. I argued that it was absolutely a waste of money to endeavor to build the large approach embankment to go up on this highway and then after you did get up on the highway you would have to come down into the water, and that there was no occasion for doing that, and that we should terminate the track construction where the level surface of the ground would meet the right of way of the bridge. That matter was discussed with several people. I also told Mr. Burckhalter what my conclusions were, and he nodded assent. That is the reason why that particular clause or restriction exists in the Emma Rose deed (R. 195).

Mr. Burckhalter testified: It is proposed to extend this track upon the Rose property to the southerly line of the toll bridge road for the sole and exclusive purpose of developing an industrial area upon the Rose property (R. 127). If I said yesterday that the line which we proposed to build might extend across the San Francisco Toll Bridge highway, I was mistaken, because while we have the authority to build, or rather while we have the appropriation to build across the Toll Bridge highway our agreement with the Emma Rose management is that we shall build up to the southerly line of that road and that is as far as we now intend to build (R. 129). The agreement as we all know provides that the track will be built to the southerly line of the Toll Bridge road (R. 129). The matter was discussed among ourselves and was generally understood that we would only build that much of the track required by our agreement with the Rose Estate at this time (R. 130).

Mr. Kirkbride, under whose direction the track was being constructed, testified: When the construction of the proposed spur track began I called the attention of those who had immediate charge of the construction to the provision in the deed whereby the track was to be constructed out to but not beyond the southerly boundary line of the Toll Bridge road. (R. 175). The instructions to Mr. Mathews, under whose immediate supervision the work was done (R. 136), were to the effect that we would not build across the San Francisco Bay Toll Bridge Road (R. 140).

Mr. McCurdy, Manager of the Rose Estate, testified: The road was to be built as it was called for in the conveyance (R. 217).

Mr. McGanney testified: It is not the intention to construct the track beyond the San Francisco Bay Toll Bridge Road. I read the deed from the Emma Rose estate to the Southern Pacific Company before it was executed. It only requires us to go as far as the Toll Bridge road. That was our intention (R. 255).

Mr. Paul Shoup testified: It was the intention originally to extend it (the track) to the boundary of the Rose property. That was before the San Francisco Bay Toll Bridge was projected, and it is intended now to extend it simply to the toll bridge right of way (R. 211). I said that my understanding was that we did intend originally to cross the Toll Bridge highway; that it was going to the edge of the Rose property. I had no knowledge of the Toll Bridge highway at that time. The construction which I understood my company was going ahead with was to the edge of the Rose property, but naturally we stop now in view of the obstruction that is placed there. In fact, there is very little property beyond that obstruction in the shape of the Toll Bridge highway, which is on a fill, I believe, so the engineers tell me (R. 212).

With the exception of Mr. McCurdy all of these witnesses were officers of appellant but their evidence is fully corroborated by other circumstances and evidence.

The track could not be built across the road without permission from the California Railroad Commission, a franchise from the county and various preliminaries would have to be handled (R. 129) and Mr. Kirkbride, under whose direction this track was being built, could not build across the road without bringing the matter to the personal attention of Mr. Burckhalter because Mr. Burckhalter must handle applications to the California Railroad Commission for crossing highways. They require his personal signature (R. 130).

The evidence is further corroborated by the testimony of Mr. Williams, Chief Engineer of appellee (R. 82). He testified: The survey stakes for this line start in the vicinity of the Southern Pacific's main line and they go about 3450 feet northeasterly of the end of the piece of track to the immediate vicinity of the approach to the toll bridge (R. 93). Referring to the partially completed track he testified: If the track were completed and connected up with the Southern Pacific main line and extended on out to San Francisco Bay Toll Bridge *as is indicated by the survey stakes on the ground,* it would serve from that immediate section of track all of the Emma Rose property and the property to the south belonging to the Leslie Salt Company (R. 95). In other words the survey stakes on the ground, as found by Mr. Williams, Chief Engineer for the appellee, show that the track would be constructed from appellant's main line only to the southwesterly boundary of the San

Francisco Bay Toll Bridge Road. These silent witnesses shout aloud their corroboration of the testimony of appellant's officers that it was the intention to construct this spur track across the Emma Rose property only to the southwesterly boundary of the San Francisco Bay Toll Bridge Road.

IV.

IT WAS NOT THE PURPOSE OF APPELLANT TO EXTEND THIS TRACK AT THE EASTERLY AND NORTHERLY END NORTHERLY AND SOUTHERLY AND APPROXIMATELY PARALLEL WITH THE RAILROAD OF APPELLEE BUT ONLY TO CONSTRUCT ITS TRACK FROM A POINT ON ITS MAIN LINE EASTERLY TO THE SOUTHWESTERLY LINE OF THE SAN FRANCISCO BAY TOLL BRIDGE RIGHT OF WAY.

The Master's finding of fact No. 15 (R. 42), which was adopted as that of the Court (R. 58), is as follows:

> "15. The purpose of the Southern Pacific Company was and is to connect said track at its westerly end with the railroad of the Southern Pacific Company and to extend the said railroad at the easterly end northerly and southerly, and approximately parallel with the railroad of the plaintiff."

Appellant's exception (R. 48) thereto is as follows:

> "(5) Defendant excepts to finding No. 15 that the purpose of defendant was and is 'to extend said railroad at the easterly end northerly and southerly and approximately parallel with the

railroad of the plaintiff' upon the ground that said finding is contrary to the evidence and because in this respect the Master should have found but failed to find that the purpose of defendant was and is to only construct said track from a point on its main line easterly to the southwesterly line of the San Francisco Bay Toll Bridge Road right of way."

It has been shown above under II that the only territory involved in this proceeding is the Emma Rose property containing about 500 acres lying immediately adjacent to appellant's main line railroad. It has also been shown above under III that appellant intended to construct its track from a point on its main line easterly only to the southwesterly line of the San Francisco Bay Toll Bridge road, and that the track was being built for the sole and exclusive purpose of serving the Emma Rose property industrially. This shows that the plan and intention of appellant was not to extend its track at its easterly end northerly and southerly and approximately parallel with the proposed railroad of appellee, but there is other direct evidence proving that appellant had no plan and intention of so extending its track.

Mr. Paul Shoup testified: My company has a comprehensive policy for the supplying of railroad service with respect to what is known as the Rose property lying directly east of San Mateo. With the exception of that property we have no plan at all. There has been some discussion of development immediately

south of South San Francisco and of some development lying immediately south of the cement plant at the end of the spur-track running eastward from Redwood City, but we have no plans at all for the development of the property at San Mateo point and southerly thereof and running down as far as San Francisco Bay Toll Bridge properties. I know of no discussion concerning the development of the property immediately south of that known as Brewer's Island. As to all of the territory from San Mateo point and extending northerly, there has been some discussion of the development of the property, as I said, immediately south of South San Francisco, involving the Mills estate. That is the property about where the airport is. Between the municipal airport, or the approximate location of it, and extending southerly along the Bay Shore as far as the cement plant at Redwood City in the territory bounded on the west by our main line tracks and on the east by the Harbor Line I do not recollect any project for the development of that property by our company. There have been discussions at various times of plans up and down there, but we have no plans, ourselves, for the development of any tract in there that I remember of (R. 198, 199).

The Southern Pacific Company has no intention of extending the track in any direction. The project is completely and finally outlined in the authority for expenditure which has been issued and approved and is complete in itself. It was the intention originally

to extend it to the boundary of the Rose property. That was before the San Francisco Bay Toll Bridge was projected, and it is intended now to extend it simply to the Toll Bridge right of way (R. 211).

Mr. Kirkbride testified: There was no intention on the part of the Southern Pacific to extend its tracks northerly, southerly, or easterly beyond the boundary shown in authority for expenditure. When authority for expenditure is submitted I know that it is the intention to do no more than is covered by that request and that we must not do more (R. 181).

If a large industry wished to locate in the immediate vicinity of this track over the Rose property, but off the Rose property, I would present the proposition as an entirely new project to the management and abide by their decision (R. 161).

This would necessarily follow, since appellant would, under the requirements of the Commission's Valuation Order No. 3, be required to issue an authority for expenditure for any changes in its property (R. 229, 231).

Mr. Burckhalter testified: We have no plans at this time for serving the property that commences with the end of the track on the authority for expenditure and that extends from there to San Mateo point (R. 109). I know of no plans by our company to serve the property of the San Mateo Docks Company. If there were such plans I am pretty sure

I would know of them (R. 114). We do not look for any industrial development outside of the Emma Rose property for a long time to come (R. 123).

The country to the north and east of this toll bridge road is marsh land and water principally on the east, and to the north of the Rose property, and it is not at all as suitable for industrial development as the Emma Rose property because it requires filling in before it would be equally as useful as the Rose property. There is not any possibility of developing this property for industrial purposes in the immediate future (R. 127).

In support of the allegations contained in the complaint to the effect that appellant intended to extend its track beyond the Rose property appellee introduced much evidence to show the *possibility* of extending the track to serve all or a part of the 23,000 acres, but the question involved is not whether there is a *possibility* of the track being extended but whether it was the *intention* of appellant to extend its track.

Mr. Williams, Chief Engineer for appellee, testified: The track *could* readily be extended to serve all the territory up to San Mateo point (R. 95). But as has been pointed out appellant has no plans for extending the track to San Mateo point (R. 109). He also testified: I see no reason why it *could* not be extended to serve this entire area now reclaimed and that may be reclaimed in the future up to South San Fran-

cisco (R. 95) but he also testified that to extend the line, of which this 1400 feet constituted a part, to the north it will have to cross the San Francisco Bay Toll Bridge Highway (R. 96). It has been conclusively shown, however, above under III that appellant has no intention of crossing the San Francisco Bay Toll Bridge Highway with this track. He also testified: Likewise to the south it *could* be extended along substantially the same lines as the proposed Western Pacific California Railroad Company line to serve this area down as far as Redwood Creek (R. 95).

There is no evidence in the record at all showing that it was the *intention* or *plan* of appellant to extend its track on any other property than that of Emma Rose and any farther than the southwesterly boundary of the San Francisco Bay Toll Bridge Road. On the contrary the evidence clearly shows that there was no intention or plan to extend the track in any direction.

Appellee presumably, for the purpose of showing a plan or intention on the part of appellant to extend this track, introduced in evidence as its Exhibit No. 9 (R. 200) a statement to the press by Mr. Paul Shoup dated April 1, 1929, but there is nothing in this statement that shows either plan or intention on the part of appellant to extend its track into any territory other than the Emma Rose property. So far as any intention or plan is set forth therein it shows that the

spur track under consideration was being constructed for the purpose of serving the Rose property.

After referring to the difficulty encountered in reaching an understanding with the City Manager in an effort to get certain unoccupied streets closed so that the track might be built, Mr. Shoup said: "Effort was made to avoid the difficulty by locating a new route for the purpose of serving the Rose property for which it was believed that industries could be readily secured" (R. 202). Mr. Shoup did refer to the *possibility* of extension but nowhere did he refer to any *intent* or plan on the part of appellant to extend the track. After the statement above quoted he said: "This track, by extension, also made available properties beyond" (R. 203), clearly showing *possibility* but not *intention*.

He also said: "The question then arises: Is it the best public policy to shut off from rail connection large areas that can best be used for industry, and that are not attractive from a residential viewpoint, or is it better to permit a very few industrial track crossings of the locations where such highways are to be built with proper safeguards as to switching of cars across the highways? If these few industrial spurs were built, across which the highways would be constructed later, then north and south extensions of these industrial spurs paralleling the highway would avoid the necessity of any additional crossings" (R. 205).

This last statement shows what is obvious, that if a few industrial spurs were built, across which the highways would be constructed later, then north and south extensions of these industrial spurs paralleling the highway would avoid the necessity of any additional crossings. As before stated, however, this does not express any *intention* or *plan* on the part of appellant to extend the Emma Rose spur at its easterly end either northerly or southerly or approximately parallel with the proposed railroad of appellee.

While it is manifestly *possible* to extend this or any other track indefinitely the length of the track which appellant proposed to construct must be determined by its *intention* to construct the track only to the southwesterly line of the San Francisco Bay Toll Bridge right of way. This intention is proved conclusively by the uncontradicted testimony of the witnesses and by the authorities for expenditure.

V.

APPELLANT'S TRACK WAS BEING BUILT FOR THE SOLE AND EXCLUSIVE PURPOSE OF DEVELOPING INDUSTRIALLY THE 500 ACRES OWNED BY ONE EMMA ROSE AND MEETING EXISTING DEMANDS FOR RAILROAD SERVICE THEREON.

The Master's finding of fact No. 16 (R. 42), which was adopted as that of the Court (R. 58), is as follows:

"16. Said track was not built, nor when extended as aforesaid will it be built, for the purpose of serving any now-existing industry or settlement, or meeting any now-existing demand for railroad service. The territory into which the said track will extend easterly of the plaintiff's railroad and between plaintiff's railroad and the Bay of San Francisco, and extending from the City of South San Francisco to Redwood City is unoccupied and undeveloped, there being at the present time no industry or settlement which requires railroad service at this time, nor which will, apparently, require railroad service in the immediate future."

Appellant's exception (R. 49) thereto is as follows:

"(6) Defendant excepts to finding No. 16 to the effect that said track will be 'extended as aforesaid', that is, as stated in finding No. 15, and objects to said finding to the effect that said track will be extended into any territory easterly of plaintiff's railroad and between plaintiff's railroad and the Bay of San Francisco and extending from the City of South San Francisco to Redwood City, upon the ground that said findings are contrary to the uncontradicted evidence which shows that said track will only be constructed in an easterly direction to a point on the southwesterly line of the San Francisco Toll Bridge Road right of way and that there was no intention on the part of defendant to construct its tracks beyond this point; and defendant objects to the finding that at the present time there is no industry

which will require railroad service in the immediate future for the reason that said track was built and will be built for the sole purpose of meeting the existing demands for railroad service and that there are industries which will require railroad service in the immediate future and that defendant's track was built for the sole and exclusive purpose of developing said Rose property industrially, and when completed will meet existing demand for railroad service upon the 500 acres of land owned by Emma Rose and through which its said track will be constructed."

It has been shown above under II that the only territory involved in this proceeding is that of the Emma Rose property containing about 500 acres lying immediately adjacent to appellant's main line railroad; under III, that said track will be constructed in an easterly direction only to the southwesterly line of San Francisco Bay Toll Bridge right of way for the sole and exclusive purpose of serving the Emma Rose property; and under IV that appellant has no intention or plan of extending that track in any direction. The evidence also clearly shows that there was an existing demand for railroad or switching facilities and service on the Emma Rose property.

While there were no industries located on the property of Emma Rose at the time of the beginning of the construction of the track in question there was an existing demand for spur track or switching facilities.

Commencing in 1921 the people of San Mateo were desirous of developing San Mateo by locating industries there (R. 231, 232, 241). A number of prospective industries were shown property in San Mateo, particularly the Rose property, with the idea of locating them thereon (R. 232, 237, 241, 242).

These efforts to locate industries were unsuccessful because there were no facilities for switching. Mr. Imboden testified: We always ran into a brick wall; if there are no industries there you have no facilities for switching. That was the proposition. So we insisted upon the Southern Pacific Company constructing some switch tracks in that section. So finally we sold the idea to the Southern Pacific Railroad Company and they agreed with us that you could hardly expect people to go there with light industries or with heavy industries without having some switch track facilities. They agreed to construct a switch track down through the Emma Rose property (R. 233).

Mr. Frye testified: After a year or two (after 1921) I came to the conclusion, and I believe mentioned it to the City Officials of San Mateo, that about the only way we could get industries started in San Mateo was to put a switch track down there and have something to show these prospects when I took them down. I was authorized to go ahead and tell these people that we would lay a track at the Emma Rose property so that we could develop the property industrially (R. 241).

It thus appears that spur or switching track facilities are necessary in locating industries upon industrial property and these facilities must be provided before the industries are located. There was an existing demand on the part of the Chamber of Commerce and other people of San Mateo for the industrial development of the Emma Rose property and for the construction of the spur track or switching facilities necessary to bring about that development. Repeated efforts to locate industries without available spur track or switching facilities demonstrated that the switching facilities must be provided in advance of the location of the industries.

In developing property industrially, switching tracks must be laid first and then the industries follow (R. 119, 234).

The demand for such facilities was of such importance and so pressing that in September 1925, a meeting was held in the City Hall at San Mateo to discuss the desirability of asking industries to San Mateo and particularly taking steps to locate industries on the Rose property (R. 234, 261).

In behalf of the Chamber of Commerce Mr. Imboden presented the plan of the Southern Pacific Railroad to the City Council of San Mateo to construct a switch track down through the Emma Rose property (R. 234). As a result the City Council appointed a committee to work with the Southern Pacific and the Emma Rose property, the manager of that property being E. S. McCurdy, in constructing this switch

track down through the Emma Rose property (R. 234). This committee consisted of Mayor Smith, Councilman Beer, City Manager Weissgerber, the City Attorney, Mr. McCurdy, and Mr. Peckham, the Chairman of the City Planning Commission (R. 235).

The personnel of this committee, the necessity for switching facilities in advance of development, and the activities of these representative people all show that there was a pressing demand for switching facilities as a means of developing the Emma Rose property, industrially.

VI.

APPELLANT WAS NOT CONSTRUCTING ITS TRACK FOR THE PURPOSE OF IMPEDING AND PREVENTING THE CONSTRUCTION AND OPERATION OF APPELLEE'S PROPOSED RAILROAD BUT WAS CONSTRUCTING ITS TRACK IN ACCORDANCE WITH ITS CONSISTENT POLICY OF DEVELOPING INDUSTRIAL TERRITORY ADJACENT TO ITS MAIN LINE RIGHT OF WAY.

The Master's finding of fact No. 19 (R. 43), which was adopted as that of the Court (R. 58), is as follows:

> "19. In building said track and extending the same as hereinbefore described, the purpose of the defendant company was to impede and prevent the construction and operation by plaintiff of its said proposed railroad and to prevent the construction and operation of plaintiff's railroad across said track by extending its railroad by means of said track in advance of the plaintiff's railroad into the territory heretobefore de-

scribed as lying between plaintiff's proposed railroad as located, and San Francisco Bay."

Appellant's exception (R. 50) thereto is as follows:

"(7) 'Defendant' excepts to finding No. 19 because said finding is contrary to the uncontradicted evidence and because the Master should have found, but failed to find from the undisputed evidence, that defendant's track was constructed in accordance with defendant's consistent policy of developing industrial territory adjacent to its main line right of way and that this particular project was conceived in 1921, the construction of the track was authorized April 29, 1926, prior to the time plaintiff was incorporated on July 10, 1928, and before defendant's officers had any knowledge that plaintiff intended to construct its proposed line of railroad; and that the deed granting defendant a right of way across the property owned by Emma Rose was accepted upon the express condition that:

'That Grantee will not oppose the crossing of a proposed line of railroad to be constructed by the Western Pacific Railroad Company or the Western Pacific California Railroad Company or by any corporation controlled by either of said companies, across the right of way hereby conveyed, and that if said crossing is approved by the Railroad Commission of the State of California, the Grantee will, whenever said proposed line of railroad is constructed, grant to such other company the right to construct at its sole cost and expense its railroad across the right of way hereby conveyed and

> the track constructed thereon by the Grantee, subject to the terms and conditions of the usual and customary form of crossing agreement to be executed by Grantee and such other company.' "

The Master's finding is negatived by the provision contained in the deed granting appellant a right of way across the Emma Rose property, as quoted in appellant's exception No. 7 in the next preceding paragraph. Even had appellant desired to impede or prevent the construction of appellee's proposed railroad its hands were tied by the very document granting it the right to construct its track across the Rose property. This is one of the conditions upon which the right of way was granted and it is further provided in the deed (plaintiff's Exhibit 7, p. 6) that if the grantee shall violate any of the conditions the grant should become void and the land conveyed shall revert to the grantor.

That appellant's track was not constructed upon the spur of the moment or with the object of impeding or preventing appellee from constructing its proposed railroad is further shown by the fact that negotiations leading up to the construction of this track began in 1921 (R. 214, 231, 241) and appellant agreed to construct the track in question as early as 1925 (R. 140, 233, 234, 241, 242) and the construction of the track was first authorized April 29, 1926 (plaintiff's Exhibit 5, original authority for expenditure) prior to the incorporation of appellee on July 10, 1928 (R. 2).

The reason appellant had not constructed its track previous to this time was due to the opposition of the City Manager of San Mateo. In order to build the track as shown on the map attached to the first authority for expenditure it was necessary to have certain streets closed but the City Manager refused to close the streets and to assist before the City Council in getting permission to cross certain streets. He insisted that appellant should build a subway which we estimated would cost not less than $175,000.00. This subway had no connection with the proposed track. The closing of the paper streets and the closing of certain alleys and other streets was refused. During the entire year 1926 these negotiations continued but nothing was accomplished. During 1927 the Emma Rose people, by legal means, endeavored to close these paper streets, but failed in this and toward the end of 1927 the suit was withdrawn. It appeared that it was impossible to overcome the opposition as represented by the City Manager of San Mateo (R. 144, 145).

It is true that Mr. Kirkbride, under whose supervision the track was being constructed, directed that the track be constructed with great expedition and at the same time without publicity (R. 194). The fact, however, that appellant's track was constructed expeditiously and that an effort was made to avoid publicity affords no basis for the conclusion that appellant was constructing its track for the purpose of impeding or preventing the construction of appellee's

proposed railroad. The reason for constructing the track with expedition and without publicity is readily understood in the light of all the facts leading up to the construction.

Eight years had elapsed since the beginning of negotiations, and Mr. Kirkbride wanted something done before something else arose that would interfere with the work (R. 137).

Mr. Kirkbride testified: I issued instructions that the work should be done expeditiously because we had met with delay subsequent to the meeting of the City Council on September 21, 1925, that was most extremely aggravating to me. The explanation for the opposition we encountered I never could understand or acquaint myself with. Speaking frankly, it centered about the City Manager of San Mateo. This was Mr. Weissgerber. It seemed to us that he went out of his way to oppose this industrial development. We knew that the people, generally, wanted it, we had been told that they wanted it, we were ready to build the track, the property owner was anxious to put the property on the market, and we could not understand the opposition that developed on his part to the closing of these paper streets in the southeasterly portion of San Mateo. The land was simply cow pasture. The paper streets had never been opened, or been graded. The other conditions that he put on us we felt were not valid in analyzing a problem where somebody might honestly want to build an industrial

spur. Furthermore, during these arguments that arose for nearly four years there were other happenings in San Mateo that made us think that he was against us, such as when we endeavored to fence a certain lot where encroachments were taking place, he came out with his police authority and stopped us (R. 168).

We were accused from time to time of holding up industrial development of San Mateo, that we did not build spurs to help out. This naturally aggravated us, we felt as though it was unjust (R. 170).

Those accusations were made by Mr. Weissgerber notwithstanding the efforts that were being made to construct these spurs. All of these things created a state of mind where we thought we had opposition on the part of a city official, an unjustified opposition. After we felt as though it was thought we were not honest in our intentions to build the spur, I made up my mind that I would build that spur. Having secured a right of way without incumbrance, and believing that the city manager would resort to anything he possibly could think of, even though it might not be fair means, to stop my work, I instructed that it be constructed without delay, that is, after the deed was recorded. I made myself very emphatic in connection with issuing the orders. As I have stated previously, the final order was given either Thursday night or Friday morning, following the recording of the deed (R. 170).

The fears which I entertained that Mr. Weissgerber would interfere with the construction of this track were borne out by subsequent events. He came out with the chief of police of San Mateo Monday morning and catechised the foreman severely, questioning his authority for doing the work and endeavoring to get him to stop. In addition he got out an injunction which stopped the work. We looked upon that injunction as being a phoney injunction, because of the facts being misstated, and for the further reason that in order to make certain facts correct he sent his men out after the injunction was issued by the Court and constructed a sewer line unauthorized, I think, so far as the property owners were concerned. The facts being so apparent, I then went to the mayor, and subsequently, to the City Council, and laid these various facts before them, and asked them, in effect, why there was any occasion for any dispute between the city authorities and ourselves, and why any occasion for this injunction. The result of that was that we speedily came to an agreement and the injunction of the city of San Mateo was withdrawn (R. 170).

Under this state of facts it is not surprising that appellant desired to construct the track with expedition and without publicity. Efforts had been made since 1921 to provide switching facilities for this property and appellant was being interfered with at all times by the City Manager of San Mateo, and yet appellant was accused of holding up industrial devel-

opment of San Mateo by not building spurs to help out.

Mr. Kirkbride further testified: I did not contemplate any opposition from the Bay Shore highway, because I was aware of the fact that at least in four instances in securing a right of way from South San Francisco to San Mateo they had accepted deeds in which the property owner had the right subsequently to build railroad tracks across the highway, either at grade, under grade, or over grade. Furthermore, I had knowledge of the fact that throughout the State of California we had many spur tracks crossing highways, county roads, and streets, where dense traffic exists, and in no case that I know of do the tracks cross other than at grade. Furthermore, I knew that this highway leaving San Francisco crossed over an industrial spur track at grade, known as the Carrol Avenue track, in an industrial district that has come up within the last three years. And furthermore, that this highway crossed the Southern Pacific's spur at grade in the vicinity of the county line near Bay Shore. And, furthermore, that this highway would cross a spur-track which we have at Redwood City, leading out to the cement works. And as the highway engineers and myself had worked out a great many problems whereby the railroad company granted them easements without cost for their highway construction, I did not contemplate any particular opposition from the highway engineers. I, of course, did not contem-

plate any opposition from the Western Pacific, because I presume that the provision in the Emma Rose deed protected them to their satisfaction (R. 148, 149). This deed provision is quoted above.

Appellant had another reason for constructing the track with expedition. Mr. McCurdy, Manager of the Rose property, testified: I wanted the track and I wanted it quick (R. 217).

Mr. Kirkbride testified: Under our deed we had six months to build a line but I do not think that was ample time (R. 154). It was ample as far as the physical features were concerned (R. 155). As the facts have shown, you run into all kinds of difficulties that interfere with doing your work. Mr. McCurdy had left for New York, with the idea of putting this property on the market, and it was important to have a track there so that we could show him what there was there, and to show our good faith in building the track (R. 154).

Appellant's forces, in constructing the track, worked on Sunday but this affords no basis for the conclusion that the track was constructed with the intent to impede and prevent the construction of appellee's proposed railroad.

Mr. Kirkbride testified: I gave instructions to Mr. Mathews either Thursday afternoon or Friday morning, that is, either the 21st or 22nd of March of this

year. I told Mr. Mathews probably in this language, or to this effect: I want you to get busy and build that track, we have been talking about it for about four years, and I will expect you to get results in about four days. That was said in a facetious way, but, nevertheless, I said that with the idea of impressing upon him the fact that I was disgusted with the difficulties that had been presented to us, and I wanted something done before we found something else that would interfere with the work. I gave him no instructions to continue his work over Saturday afternoon and Sunday and did not instruct him as to where he was to commence building (R. 137).

I did not tell Mr. Mathews that it was necessary for him to work over Saturday afternoon and Sunday in order to avoid the City Manager of San Mateo having recourse to the courts. We do not work Sundays. We avoid it when possible. There was a misunderstanding in connection with the working on Sunday. I had issued instructions, either late Thursday afternoon or Friday morning, that they were to get busy and build this track, and I didn't want any delay about it. Those instructions were taken literally, and the men worked Sunday (R. 151).

Mr. Kirkbride first learned about the Sunday work from the newspapers on his arrival at his office at 8:30 Monday morning, March 25th, and he dictated the following (R. 195) to Mr. Mathews:

"March 25, 1929.

"Mr. Mathews:

"I note that Saturday you ordered Coast Division to work their track forces Sunday on building the San Mateo track.

"Sunday work is not permitted and under no circumstances without authority of head of department. Furthermore, this has created the impression that we were trying to steal something. I am sorry you did not take this matter up with me. Please bear this in mind as I do not want any more Sunday work.

W. H. Kirkbride."

Mr. Williams, Chief Engineer of appellee, testified: The initial point of the track being constructed by the Southern Pacific, or its westerly end, is about 2,500 feet easterly from the Southern Pacific's main line; thence a track extends on a tangent or straight line running northeast about 1,442 feet (R. 89). The track is not connected with the main line (R. 91). The fact, however, that appellant did not begin the construction of its track at its main line does not afford any basis for the conclusion that appellant was constructing its track for the purpose of impeding and preventing the construction of appellee's proposed railroad. Bearing in mind that Mr. Mathews had instructions to construct the track expeditiously it is readily understood why he started construction at a point some distance from the main line in the light of the circumstances shown in the record.

Mr. Kirkbride testified: I said nothing specifically to Mr. Mathews about whether he was to commence building from our track or half mile away from there. I called attention to the fact that there were difficulties in the way where a drainage canal exists, into which a broken sewer debauched from our main line to and beyond Leslie Salt place. As to instructing him in regard to the exact detail where they should start, I did not so instruct him (R. 137). Beyond the levee of this canal was a level piece of ground that was probably 2,000 feet in length along our proposed spur that was perfectly level, where no grading was required. A track could be laid there expeditiously while other members of the construction gang were cribbing and working out their construction problem along the drainage canal (R. 149). This level ground was about 2,000 feet from the main tracks and beyond this level segment we ran into more terrain (R. 188).

Considering the problem involved it was not unusual to commence construction of the line 2500 feet away from the tracks with which we proposed to connect. I consider that a very good way was worked out there in connection with building this track. We had construction difficulties where the track leads off from the main Southern Pacific Company line. We found it more convenient to commence work at another place at some additional expense (R. 187).

It was quite natural for Mr. Mathews, having been instructed to proceed expeditiously with the work, to begin construction where there was least difficulty while other members of the construction gang were working out the difficulties caused by the drainage canal.

Mr. Kirkbride further testified that if we had not been stopped by the injunction there would have been a completely tied railroad connected up to the main line (R. 155).

The testimony of the Chief Engineer of appellee affords no basis for the conclusion that appellant was constructing its track for the purpose of impeding or preventing the construction of appellee's proposed railroad. Mr. Williams testified the track is laid immediately on top of the ground, except for the portion across the Bay Shore highway. The ties are not spaced as ties are spaced on a completed track. There are only a portion of a number of ties that would be necessary under this track or any other track that was in a completed state. Across the Bay Shore highway, however, the ties are spaced normally as they would be in a completed track (R. 89). This is fully explained in the record.

Mr. Kirkbride testified that his intention was to lay this track on the surface of the ground, and pick it up only sufficiently to give it a good running surface until such time as the manager of the Emma

Rose property could definitely state the grade line he wanted and which, of course, would depend on the wishes of the industries that he located (R. 150).

Mr. Kirkbride further testified: I know that more ties were laid across the right of way of the Bay Shore highway than on any other part of the road. I first learned that after the city got out an injunction and stopped our work, followed by an injunction by the Western Pacific. I went down there. I may say that this is a perfectly normal way to build a track, to put in a few ties under the joints, spike the rail to gauge, and come along and fill in the rail panels. If we had not been stopped by the injunction there would have been a completely tied railroad connected up to the main line. I do not think it was intentional that the ties were completed under the portion of the track which crossed the Bay Shore highway, for the reason that I observed that the foreman was filling in all the time from what we will call the westerly end of the rail to and beyond the so-called highway (R. 155).

Mr. Williams further testified: Very close to the Southern Pacific main line there are a few rails laid down which have a few ties. This is not really a track but it is laid at about track gauge. The track is about 100 feet long and is not attached or connected at either end. This piece of track is a short distance from the Southern Pacific main line and it is about 2,500 feet from the end of this short track

to the initial point of the 1442-foot section of track. This short section of track, cannot be joined to Southern Pacific main track for practical operation for two reasons, first, its line of direction is approximately at right angles to Southern Pacific main line and is so close thereto that there is not room between the westerly end of this detached piece of track and the main line to put in the necessary curve and switch to make a turnout from the main line (R. 92).

The construction of this short piece of track affords no basis for the conclusion that appellant was constructing its track for the purpose of impeding and preventing the construction of appellee's proposed railroad. The reason for the construction of this track is fully explained in the record.

Mr. Kirkbride testified: Some rails and a few ties were laid down immediately adjacent to our main track, out perhaps 100 feet. These were for push-car tracks, for unloading the rails and ties that were to be used immediately adjacent to the right of way, constructing eastward from the main line while other men were working westward (R. 155).

The character and methods of construction afford no basis for the conclusion that appellant was constructing its track for the purpose of impeding and preventing the construction of appellee's proposed railroad.

Mr. Kirkbride testified: The usual method of construction would be to build our tracks starting at or near Leslie and then following it out from the railroad and bringing along the material with us, but not necessarily the proper method under present methods of construction whereby we have machinery to handle material, whereas we formerly did not have machinery (R. 154).

While in some respects the methods used in building the track were unusual, I do not think the manner of handling the rails were unusual in view of the fact that we had modern tools to work with and the fact that I was building the track with expedition (R. 187). Under our present conditions we do not pay as much attention to push-car methods of building tracks as we formerly did, due to the fact that we now have modern tools to work with, such as caterpillars and autotrucks for the distribution of material. I stated an example in connection with a job south of Walnut Grove that I recently observed, where an autotruck was distributing ties four miles away from the rail-head. It is becoming more and more our practice to snake rails quite a considerable distance by means of caterpillars. To give another illustration, we have just finished the construction of quite a bit of track at the south approach to our Suisun bridge where we are building and all of that rail was snaked up there by autotruck—in that case on caterpillar tractors (R. 186).

It is significant that while Mr. Williams described the partially completed track in considerable detail he did not testify that the construction was at all unusual considering the construction difficulty presented, the necessity for expedition and modern methods of construction. Mr. Williams is an engineer of considerable experience (R. 82) and if there had been anything unusual or contrary to good construction practice he would have pointed out how and in what respect the methods of construction did not conform to good construction practice. He merely described the partially completed track in its then existing state without in any way attempting to criticize the methods of construction, leaving it to the uninformed to infer that there was something unusual about the methods of construction.

It may be justly inferred that Mr. Williams was not in a position to combat appellant's evidence that considering the problem involved a very good way was worked out there in connection with building this track (R. 187).

Mammoth Oil Company v. United States, 275 U. S. 13, 52.

The uncontradicted evidence clearly shows that appellant was constructing its track not for the purpose of impeding and preventing appellee from constructing its proposed railroad but in accordance with its consistent policy of developing industrially territory adjacent to its main line right of way.

Mr. Burckhalter, General Manager of appellant, testified: We stand ready everywhere along our line to encourage industrial development by the building of industrial switching tracks. We have done it from one end of the railroad to the other. Our common procedure is to lay down the track at the entire expense of the railroad, that is, the industrial switch track, if the owner of the property which is being developed will contribute the right of way. Thereafter, the individual industries which will locate will join in the expense of individual spur-tracks serving a particular industry. on what we call the usual industrial terms, whereby the railroad stands the cost of the switch and the terminal to the clear point, which is about 150 feet, and then the industrial pays the entire cost of the track beyond the clear point. That is our usual way of putting in industrial tracks all over the system. We have built a great many tracks in locations where there are no industries. I mean we have built a great many tracks such as these. Ever since my connection with the property I have known of numerous cases where we have built industrial tracks on the terms I have discussed, namely, at the entire expense of the railroad on the contribution of the right of way by the owner of the industrial area, in the hope that we would thereby bring track and ground together and lay the foundation for an industrial development. If we should wait until an industry actually wanted the ground it would take too long to

get the track in. So when a man decides that he wishes to make certain attractive land into industrial property, and the prospects look good for selling the property off as industrial property, we go into partnership with him, as it were, by contributing the track. We are willing to lay that down even before the first industry is in sight when, in our judgment, the area under construction is a good potential industrial property (R. 110).

As to a definite area of property and a definite owner of property where the owner intends to put his property on the market for industrial development, we have to lay out tracks first and then the industries follow. That is such a piece of property as Mrs. Emma Rose has. She or her manager have determined that they are going to sell this property for industrial purposes. It is a very fine piece of property for such purposes, and we have undertaken to contribute to that development (R. 119).

Mr. Kirkbride testified: These facilities which I propose to construct on the Emma Rose property are not exceptional or unusual. We are working on these problems and constructing similar tracks all the time, tracks intended solely and exclusively for industrial switching (R. 174).

Mr. Paul Shoup testified: This project is in accord with our general policy of constructing tracks

of this nature where there is a prospect of the property that is being served being developed for industrial purposes (R. 211).

Mr. McGanney, Assistant to the Freight Traffic Manager of appellant, testified as follows: It is our policy wherever possible, and where the prospects appear bright, to develop property adjacent to our tracks for industry purposes. In carrying out that policy we have found it necessary, in co-operation with property owners, to construct industrial switching tracks into acreage property from which individual industrial tracks may be taken to serve industries—the individual industry. We have pursued that policy to my knowledge since 1920, and before that, also, up and down our line, from Portland to El Paso, and Ogden. We found it necessary in the first instance to pursue this policy, for the reason that unless some plan could be worked out with property owners owning considerable property for the industrial development of that property, we felt that we would soon find ourselves without suitable property on which to locate industries adjacent to our rails (R. 248).

Right in San Francisco we have in recent years developed a very fine industrial district between Tunnels 3 and 4, known as the Paul Tract, to the west of the main line, and known as the Bay View tract to the east of the main line. That area of land was in vegetable gardens for many years past, and

cheap residential zones were gradually encroaching upon it. We finally interested the property owners to develop it industrially. We went ahead and built the industrial switching tracks, and there have been a number of fine industries located in that district since about 1923. Proceeding further south, we had a similar development at Bay Shore. And again, farther south, at South San Francisco. A few years ago we built an industrial switching track, or sometimes it is referred to as a drill track, the terms are synonymous, into about 100 acres of land prepared for industrial development by the South San Francisco Land & Improvement Company. No industries have as yet been located on that parcel of land, but we are confident that they will come within a reasonable time. There are several hundred other acres adjacent which will be served in a similar manner when the first hundred acres are used up. Farther south, again, at Broadway, in Burlingame, we built an industrial switching track or drill track, into twenty acres of land opposite our Broadway passenger station, on which we have succeeded in locating two industries. The San Mateo Rose Estate property was next in order, and we have, of course, discussed that development. Passing that, we put in several industrial switching tracks into a tract of about 40 acres at San Carlos, on which several industries have been located. And so on down the line—Santa Clara, San Jose, Salinas, on the Coast Line. We have followed exactly the same practice

in the East Bay District—Richmond, Oakland, Emeryville, Melrose, San Leandro (R. 249-250). We have followed the same practice exactly in Sacramento, Stockton and Fresno (R. 251).

VII.

THERE IS NO EVIDENCE IN THE RECORD THAT THE MAINTENANCE OR OPERATION OF APPELLANT'S TRACK ACROSS THE PROPOSED RAILROAD OF APPELLEE WOULD SERIOUSLY IMPEDE OR RENDER MORE DIFFICULT, HAZARDOUS OR EXPENSIVE THE CONSTRUCTION OF APPELLEE'S PROPOSED RAILROAD.

The Master's finding of fact No. 21 (R. 44), which was adopted as that of the Court (R. 58), is as follows:

> "21. The maintenance and operation of the track described across the railroad of the plaintiff will seriously impede and render more difficult and hazardous and expensive the construction of the plaintiff's railroad and its operation after completion."

Appellant's exception (R. 51) thereto is as follows:

> "(8) Defendant excepts to finding No. 21 because said finding is contrary to the undisputed evidence and also because said finding is unsupported by any evidence."

While appellee alleged in its amended complaint that the maintenance and operation of appellant's track across the proposed railroad of appellee would seriously impede and render more difficult and hazardous and expensive the construction of appellee's proposed railroad and its operation after completion, this allegation is denied by appellant. The burden of proof, that is the duty imposed by law to prove its case, was upon appellee, but appellee introduced no evidence that shows or tends to show or even remotely suggests that the maintenance and operation of appellant's track across the proposed railroad of appellee would seriously impede or render more difficult and hazardous and expensive the construction of appellee's proposed railroad and its operation after completion. By failing to introduce any evidence in support of this allegation, appellee failed to sustain the duty imposed by law and therefore there is no basis for the Master's finding.

VIII.

THERE IS NO EVIDENCE IN THE RECORD THAT THE MAINTENANCE OR OPERATION OF APPELLANT'S TRACK IN SAID TERRITORY WILL DESTROY IN A SUBSTANTIAL OR ANY MEASURE, THE VALUE OF APPELLEE'S PROPOSED RAILROAD BY DECREASING THE BUSINESS AND REVENUE OF APPELLEE'S PROPOSED RAILROAD AND IMPEDING OR RENDERING MORE DIFFICULT AND EXPENSIVE THE GIVING OF RAILROAD SERVICE BY APPELLEE.

The Master's finding of fact No. 22 (R. 44), which was adopted as that of the Court (R. 56), is as follows:

> "22. The maintenance and operation of the railroad of the Southern Pacific Company into the said new territory will destroy in a substantial measure the value of the railroad of the plaintiff by decreasing the business and revenue of said railroad and impede and render more difficult and expensive the giving of railroad service and facilities to the new territory."

Appellant's exception (R. 51) thereto is as follows:

> "(9) Defendant excepts to finding No. 22 because said finding is contrary to the undisputed evidence and also because said finding is unsupported by any evidence."

While appellee alleged in its amended complaint that the maintenance and operation of appellant's railroad into said territory will destroy in a substantial measure the value of appellee's proposed

railroad by decreasing the business and revenue of said railroad and impeding or rendering more difficult and expensive the giving of railroad service and facilities to the territory, this allegation is denied in appellant's answer to the amended complaint. The burden of proof, that is the duty imposed by law to prove its case, was upon appellee but appellee introduced no evidence that shows or tends to show or even remotely suggests that the maintenance and operation of appellant's proposed track into said territory would have such an effect. By failing to introduce any evidence in support of this allegation appellee failed to sustain the duty imposed by law and therefore there is no basis for the Master's finding.

Furthermore, appellee has no railroad, no business, and there is no assurance that it will ever have either a railroad or a business.

IX.

APPELLANT'S TRACK WILL BE CONSTRUCTED IN ACCORDANCE WITH THE USUAL PRACTICE AND STANDARDS OF CONSTRUCTING INDUSTRIAL SPUR AND SWITCHING TRACKS BY APPELLANT AND OTHER CALIFORNIA CARRIERS.

Appellant's exception No. 12 (R. 52) to the Master's report is as follows:

"(12) Defendant excepts to the master's report because the master should have found, but

failed to find from the undisputed evidence, that defendant's track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks since the enactment of the Transportation Act and that at the time defendant was engaged in constructing its said track defendant had at least two hundred spur-tracks under construction at other points along its lines, and that said track will be constructed in accordance with a similar policy and practice which has been adopted by other carriers in California, including the Western Pacific Railroad Company of which plaintiff is a subsidiary, of constructing industrial switching spur-tracks at points along their lines to serve industries located thereon or to be located thereon."

The characteristics of appellant's track and its manner of construction, when considered in connection with the fact that it is being built into territory already served by appellant and by no other common carrier by railroad, as shown *infra* under XI, are helpful in determining whether appellant's track is an extension of its line of railroad or an industrial spur or switching track. The uncontradicted evidence shows that appellant's track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks by appellant and other California carriers, and therefore the Master should have made a finding in accordance with appellant's exception.

It has been shown above under VI that appellant's consistent policy and practice has been and is to construct, in cooperation with property owners, industrial switching tracks into acreage property from which individual industrial tracks may be built to serve industries.

Mr. Burckhalter testified that this was appellant's policy (R. 110, 119). Mr. Paul Shoup testified likewise (R. 211). Mr. McGanney testified to the same effect (R. 248).

Mr. McGanney further testified: We have constructed such industrial switching tracks in San Francisco, South San Francisco, Burlingame, San Carlos, Santa Clara, San Jose, Salinas, Richmond, Oakland, Emeryville, Melrose, San Leandro, Sacramento, Stockton and Fresno (R. 249, 250, 251). Both the Atchison, Topeka & Santa Fe Railway and the Western Pacific have done likewise, both for their own account and jointly with the Southern Pacific Company. We have joint industrial switching tracks at Oakland, 16th Street with the Santa Fe and joint industrial switching tracks with the Western Pacific at Melrose and at Fitchburg, designed to and which are accomplishing the identical purpose for which the Emma Rose industrial switching spur was planned. All of these facilities have been constructed since 1920. None of the carriers interested in any of these facilities applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under the

provisions of paragraph 18 of the Interstate Commerce Act. The Western Pacific has followed the same practice at Stockton and the Santa Fe and Southern Pacific Company at other points in the San Joaquin Valley. The Western Pacific built a long track which they considered a spur track from off of their main line just north of the city limits of Stockton, swinging around the city of Stockton to the north, to the west and thence turning east and serving the north side of the Stockton channel. The Southern Pacific constructed a similar track along the south side of the Stockton channel, although it was not as long as the one constructed by the Western Pacific but it served the same purpose. This Western Pacific track is approximately six miles long (R. 250, 251).

Defendant's Exhibit L (R. 273) reflects typical industrial switching tracks that have been constructed by Southern Pacific Company subsequent to 1920. Such construction was for the purpose of reaching industrial areas adjacent to appellant's main line of railroad.

All of these spur or industrial tracks were constructed by appellant without authority from the Interstate Commerce Commission (R. 275).

Appellant is also constructing a spur or industrial track at the City of Richmond to serve the Richmond water front without making application to the Interstate Commerce Commission therefor. From where it leaves the main line and out to where it ends this track is about 9000 feet in length (R. 276).

Mr. Kirkbride testified: The character of construction did not conform to the main line or even branch line construction. It conforms to spur track construction. There are numerous cases where facilities of a similar character have been constructed extending from the main line of the Southern Pacific along the peninsula. He pointed out where such tracks had been constructed in San Francisco, South San Francisco, Burlingame, San Carlos, Redwood City, Santa Clara, Salinas, Watsonville, Guadalupe (R. 173, 174). These facilities which I proposed to construct on the Emma Rose property are not exceptional or unusual. We are working on these problems and constructing similar tracks all the time. Tracks intended solely and exclusively for industrial switching (R. 174).

Since 1920 the Western Pacific constructed certain tracks in San Francisco west of Sixth Street and south of Bryant Street, in that general territory, similar in character to our proposed tracks and along their track in the vicinity of our railroad in the southerly part of the Oakland territory. The Western Pacific has also constructed a similar facility at Stockton since 1920 (R. 174).

The construction of the Rose spur was just one job out of many. At the time this job was going on I had actually under way over 1300 authorities, at least 200 of those authorities being the construction of spur track sidings (R. 152).

The character of construction of the track under consideration conforms to the usual method of constructing spur tracks. The rail was to be second-hand 90-pound rail released from the main line. Our policy is to wear out the rail on the main line and when it is ready to be removed we then take it up and use it for siding and spur track construction. The rail that was being used in the Emma Rose spur was of that kind, second-hand 90-pound rail. That is the same kind of rail that serves the Leslie Salt Works. A turn-out portion of the Leslie Salt Works spur is a 110-pound rail. Any spur leaving the main line, the switch turnout portion of it consists of main line rail-in this case 110. I believe the remaining portion of the Leslie spur is 90-pound rail. All of the industrial tracks that I am building this year, with very few exceptions, consist of 90-pound rail. The reason for that may be explained in this wise: In former years 75 and 80 pound rail was standard in the main line. As that rail was removed such rail was used in constructing spur-tracks. Along in 1907 the 90-pound rail was adopted as standard. That 90-pound rail now is beginning to come out of the track, and, in fact, we found it necessary, due to increased traffic in 1922, to abandon the use of 90-pound rail, and we adopted 110-pound rail for use on tangent track, and we use 130-pound rail in curved track if the tonnage justifies; if the tonnage does not justify it then the curve is laid with 110. In other words, there is no more 90-pound rail being purchased for main line use. The old rail is now com-

ing out of the track, the old 90-pound rail is now coming out of the track, due to the fact that it is in some cases as old as 20 years. Therefore, all of our construction, or, rather, a large part of our construction of spurs, yards, and sidings are 90-pound rail because we do not have the 75 or 80 (R. 166, 167). We have 90 pound rail in a number of places in our main line but we are not buying any more 90-pound rail. As that 90-pound rail wears out we remove it and use it elsewhere (R. 189). All the rail that I am laying in the main line is 110-pound rail on tangents and 130-pound rail on curves, unless the curve is very slight and then 110 pound is used (R. 188). We are removing 90-pound rail from our main line as rapidly as we can (R. 189). In building sidings, spurs and industrial tracks we use the available second-hand rail that we have (R. 193).

As to cross ties, they were 7 by 8 redwood ties, conforming to standard construction in connection with spur-tracks (R. 167). In the main line we use a larger tie, a creosoted tie, a fir mainly, 7 by 9 by 8—creosoted fir, or pine, or gum (R. 167).

It is significant that appellee introduced no evidence to contradict appellant's evidence that its track will be constructed in accordance with the usual practice and standards of constructing industrial spur and switching tracks by appellant and other California carriers and particularly to contradict appellant's testimony that the Western Pacific, the parent company

of the appellee, followed the same practice. Mr. Williams, Chief Engineer of appellee and also of the Western Pacific, who testified in this case, was undoubtedly familiar with the usual practice in this territory, certainly insofar as the Western Pacific is concerned.

Again it may be justly inferred that appellee was in no position to combat appellant's evidence with respect to the practice and standards in this territory of constructing such facilities in cooperation with property owners for the purpose of developing adjacent territory industrially.

Mammoth Oil Company v. United States, supra, p. 52.

X.

APPELLANT'S TRACK, WHEN CONSTRUCTED, WILL BE OPERATED IN THE SAME MANNER AS OTHER INDUSTRIAL TRACKS, WILL BE USED EXCLUSIVELY FOR SWITCHING CARLOAD FREIGHT FROM AND TO INDUSTRIES AND WILL HAVE NONE OF THE ATTRIBUTES OR CHARACTERISTICS OF MAIN OR BRANCH LINES.

Appellant's exception No. 13 (R. 52) to the Master's report is as follows:

"(13) Defendant excepts to the Master's report because the master should have found, but failed to find from the undisputed evidence, that the track proposed to be constructed by defendant will, when constructed, be operated in the

same manner as other industrial tracks constructed since the enactment of the Transportation Act and that said track will be used exclusively for switching purposes, no less than carload business will be handled, no passenger trains will be operated over said track, no trains or engines will be operated over said track on time-cards or schedules, the billing of freight to and from industries served by said track will be performed at the present station of San Mateo, there will be no agent located at any point on said track, there will be no telegraph lines operated in connection with said track, there will be no freight sheds nor any station buildings at all located upon or adjacent to said track, operations upon said track will be conducted in the same manner as is usual and customary in switching carload freight to and from industries at other points on defendant's lines, all switching will be performed at night, there will be no storage track for the storage of cars in connection with said track, said track will be a part of defendant's San Mateo Station trackage facilities, rates published in defendant's freight tariffs to and from said San Mateo Station will apply to industries served by said track, no less than carload rates will apply to or from industries served by said track but said less than carload rates will only apply to and from said San Mateo Station, there will not be any additional switching charge assessed for moving shipments from or to San Mateo Station and from and to industries served by said track, all shipments moving to and from industries served by said track will be billed by defendant's agent at

San Mateo as originating at said station and there will be no express or mail service performed upon said track."

The method of operating appellant's track, when considered in connection with the fact that it is being built into territory already served by appellant and by no other common carrier by railroad, as shown *infra* under XI, is helpful in determining whether appellant's track is an extension of its line of railroad or an industrial spur or switching track. The uncontradicted evidence in this case shows that appellant's track will possess none of the attributes of a main or branch line of railroad, but will be operated in identically the same manner as other industrial spur or switching tracks are operated at San Mateo and at other points on appellant's line. The Master should, therefore, have made a finding in accordance with appellant's exception.

Mr. Burckhalter testified: The service that we propose over this line is industrial switching service. By that I mean the operation of locomotives to pick up and set in cars needed by industries (R. 109). The track will be operated by a switching crew which would naturally be a local freight crew until such time as business got heavy enough to warrant the assignment of a special engine. The movements will be switching movements. The trains or cars or engines will go on and off at the junction of the industrial switching track with the track to be constructed parallel with the main track (R. 123).

The service to all industries will be switching service. By switching service I mean service performed by locomotive and a crew shifting cars in and out of tracks as distinguished from an operation over a main track where the crews operate by time-table and train orders. The less-than-carload business would be handled by the main line stations, irrespective of the number of industries which might develop (R. 124).

The proposed spur-track will be used exclusively for switching purposes. No less-than-carload business will be handled over it, no passenger trains will be run over it, and no trains or engines will be operated over it under time-card schedule. Upon completion of the track the switching should for economical reasons first be done by the local freight crew that does the switching at San Mateo now. Should the business get heavy enough, that is, the switching business get heavy enough at San Mateo and vicinity, then a specially assigned switch engine would be put on. The billing will be taken care of at the station at San Mateo. No agent will be located at any point on the track; there will be no telegraph lines extended along this track; and no freight sheds or station buildings at all located on this track. The operation of engines and trains over this track will be the same as is usually performed in the yard. The engines will move as switching engines under yard rules, which means that they will move without time-table authority or train orders, but will move under control and keep out of the way of one another when there is more than one engine, and

should there be more than one engine on the track. The operation over this track will be the same as is usually performed in switching carload freight to and from industries at other points on the Southern Pacific Company's lines (R. 128).

Mr. Kirkbride testified: This spur track is to be used for one specific purpose, namely, the switching of loaded and empty cars to and from the industries that may locate thereon adjacent to it (R. 175).

It is contemplated that the switching over this spur track will be done as follows:

The local freight, in performing its station work at San Mateo, and which is done during the midnight hours, along between one and three A. M., would set out its local freight train on the passing siding, and then the crew, in connection with spotting up on the various industrial spurs and house tracks at San Mateo, would go in on the Emma Rose spur, and if it were necessary to go down at the easterly end thereof in order to serve some industry they would proceed under control, that is, the engine would be coupled on to the cars, and a brakeman, would be riding on the top of the cars, and a brakeman would be on the engine, and they would take out the loads and spot up the empties at any industry. In crossing any road that might be existing across the spur they would proceed absolutely under control. As I stated yesterday, they would not be permitted to switch any cars across a road, or a highway, or a street, without having control

of the car through coupling with the engine. A brakeman would ride the end of the cut opposite to the locomotive, and would flag the crossing. That is the custom and that is the instruction. That is the same way in which they make switching movements right in front of the Ferry Building in San Francisco on the Belt Line, except that on the Belt Railroad in front of the Ferry Building they have long cuts of 30 to 60 cars or more. In this particular case there would never be, in my judgment, more than six cars coupled to an engine (R. 191).

Mr. McGanney testified: The proposed track will be a part of San Mateo station and the rates published in our freight tariff to and from San Mateo will apply to industries located on or served by the Emma Rose spur. There will not be an additional switching charge (R. 248).

Shipments moving to and from industries located on the Rose property will be billed by the agent at San Mateo as originating at San Mateo. They will take the San Mateo carload freight rates, and be handled in every manner similar to an industry located right alongside the freight station. If an industry should locate on either the light or heavy industrial property and have an L. C. L. shipment to deliver to, or receive from, the railroad, such shipment would be handled either by motor-truck or by dray to and from the San Mateo freight station. That is the usual and the invariable custom and the practice at all such similar points (R. 254).

XI.

THE EMMA ROSE LAND UPON AND ACROSS WHICH APPELLANT'S SAID TRACK IS TO BE CONSTRUCTED WAS AT THE TIME APPELLANT LOCATED ITS TRACK, AND IS NOW, A PART OF THE TERRITORY BEING SERVED BY APPELLANT AND WAS NOT AT ANY TIME AND IS NOT NOW BEING SERVED BY ANY OTHER COMMON CARRIER.

Appellant's exception No. 16 (R. 54) to the Master's report is as follows:

> "(16) Defendant excepts to the master's report because the master should have found, but failed to find, that the Emma Rose land upon and across which defendant's said track will be constructed was, at the time defendant located its said track and at the time defendant acquired its right of way over and across said land, and is now, a part of the territory at all of said times being served by defendant and that at all of said times said land was not and is not now being served by any other common carrier."

In order to apply correctly the rule, discussed *infra* under XIII, which the Supreme Court of the United States announced in *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266, for determining whether a track is an extension of a line of railroad or an industrial spur or switching track, it is of importance to determine whether appellant's track will provide facilities in territory already served by it and also whether this territory is served by any other carrier.

The Emma Rose tract of land consists of about 500 acres (R. 257) situated entirely within the City of San Mateo (Exhibit A attached to appellant's answer to amended complaint, R. 28). It abuts appellant's main line right of way for 1907 feet (R. 126). The property abutting appellant's main line is available for and suitable to industrial purposes (R. 127). That portion of the property immediately adjacent to appellant's main line right of way and extending to the Bay View Boulevard has been zoned as light industrial property and that portion between the Bay View Boulevard and the San Francisco Bay Toll Bridge Highway has been zoned as heavy industrial property, except the northernmost portion of the property which has been zoned for second class residential. This zoning was done under Ordinances of the City of San Mateo and the zoned areas are graphically shown on defendant's Exhibit F, sheet 3 (original of which has been transmitted to this Court under order of the District Court, R. 252, 253).

Appellant's track is located wholly within the city of San Mateo, and all on the Rose property except a very small piece that crosses the corner of the Leslie Salt Works (R. 127). It lies within the Rose property which has been zoned industrially (R. 253).

Generally the Emma Rose property at the present time is a level field commonly known as pasture land (R. 165, 169).

Appellant's railroad was built to and through the City of San Mateo in 1863 (R. 126), that is, appellant began serving the City of San Mateo in 1863 and it was still serving that territory at the time of this construction (R. 126).

Evidence introduced by appellee shows that San Mateo is served by appellant and by no other common carrier by railroad. In connection with its application to the Interstate Commerce Commission for authority to construct its proposed line between San Francisco and Redwood City, appellee in its return to a questionnaire propounded by the Interstate Commerce Commission (plaintiff's Exhibit 2, Return to Questionnaire Question and Answer 11, p. 6; the original exhibit has been transmitted to this Court under order of District Court), admits that San Mateo is served by appellant and by no other common carrier by railroad. The Emma Rose land upon and across which appellant's track is being constructed is a part of the City of San Mateo (Exhibit A attached to appellant's answer to amended complaint, R. 28), that is, a part of the territory now served by appellant and so served for many years.

The fact that the Bayshore Highway will be constructed at some time across the Emma Rose property does not limit the territory of appellant to that portion of the Emma Rose property lying westerly of the proposed location of the Bayshore Highway.

It is obvious that a highway does not operate to limit the territory served by a railroad. If it did a highway constructed immediately adjacent to the right of way of a railroad, as is often the case, would limit the territory of the railroad to its right of way. This of course would be absurd.

At the time appellant began constructing its track, and in fact at the time of the hearing, there was no highway across the Emma Rose property. There was only an intention to construct a highway but the intention did not constitute a highway. The question of appellant's track crossing the proposed highway was submitted to the Railroad Commission of the State of California to determine the necessity for the separation of grades (R. 279), and the Commission held (R. 281):

> "The Commission cannot recognize a mere intention of a state or other political body, to acquire a right of way and construct a public thoroughfare, as constructing a public road such as referred to in Section 43 of the Public Utilities Act."

Nor does appellee's proposed railroad limit the territory being served by appellant. Appellee has no railroad and cannot construct a railroad unless and until it obtains from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction of its proposed railroad. Furthermore, coun-

sel for appellee admitted that appellee had abandoned the argument with regard to the priority of location with respect to the crossing of the appellee's proposed route by appellant's track commenced on March 23, 1929. That point was abandoned when appellee discovered that its resolution of location was adopted after March 23, 1929, upon which date appellant commenced the construction of its track (R. 287).

The conditions at the time of appellant's construction necessarily determine whether the Emma Rose property was a part of appellant's territory or not. Since it conclusively appears that this property was a part of appellant's territory the situation would not be altered if appellee subsequently built its proposed railroad into appellant's territory.

XII.

APPELLANT'S TRACK, WHEN CONSTRUCTED, WILL BE AN INDUSTRIAL SPUR OR SWITCHING TRACK IN ACCORDANCE WITH THE MEANING OF THESE TERMS BEFORE THE INTERSTATE COMMERCE ACT WAS AMENDED BY THE TRANSPORTATION ACT, 1920, AND WITHIN THEIR MEANING AS THEY APPEAR IN PARAGRAPH (22) OF SECTION 1 OF THE INTERSTATE COMMERCE ACT.

Appellant's exception No. 14 (R. 54) to the Master's Report is as follows:

"(14) Defendant excepts to the master's report because the master should have found, but

> failed to find from the evidence, that defendant's said track when constructed will be an industrial spur and switching track and that in accordance with the meaning of these words or terms as they appear in the Transportation Act of 1920 said track will be an industrial switching spur-track."

It has been shown above under VI and IX that appellant's track will be constructed in accordance with the usual policy, practice and standards of constructing industrial spur and switching tracks by appellant and other California carriers and under X that the track will be operated as an industrial spur or switching track and used exclusively for switching cars to and from industries.

Industrial spur or switching tracks are defined and described in *Associated Jobbers of Los Angeles v. The Atchison, Topeka & Santa Fe Railway Co., et al. (Los Angeles Switching Cases)*, 18 I. C. C. 310, 312, by the Interstate Commerce Commission as follows:

> "These industry spurs vary in length, some leading directly from the main track into or alongside of the industry served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood."

This same language was used by the Supreme Court of the United States in defining and describing industrial spur or switching tracks in the *Los Angeles*

Switching Case, 234 U. S. 294, 306, in which case the Supreme Court upheld the decision of the Commission.

The tracks in that case varied from one-fifth of a mile to seven miles in length. In this case the length of the industrial spur or switching track, as authorized by the last revision of the authority for expenditure, is 8200 feet. The track actually being constructed was several hundred feet less than this due to the fact that it was not to be constructed further than the southwesterly boundary of the San Francisco Bay Toll Bridge road because of the obstruction made by the fill upon which that road was located.

Appellant's track is an industrial spur or switching track within the definition of the Commission and of the Supreme Court of the United States, particularly that portion which says "others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to several other industries in the immediate neighborhood." The track which appellant was engaged in constructing was the "lead" or "drill" track from which short spurs are to be built to serve the individual industries locating adjacent to the "lead."

Mr. Burckhalter testified: We would not use this track for loading and unloading cars. It is a work track. The industries to be served will be immediately adjacent to this right of way but they will take their service from a short spur track just as short as they can get along with, building out from these industrial

switch tracks that the authority for expenditure covers (R. 111). Cars will be loaded on the industrial tracks to be built by the industries located on the property. The number of spurs taking off of this track on the Emma Rose property depends altogether on the number of industries which may locate there and what their track requirements may be (R. 123).

Mr. Kirkbride testified: Off of this switching track we propose to construct spurs, relatively short, but of sufficient length to serve the industry that was proposed to locate, or that had located. They would be connected with this switching track at one end by a switch (R. 177).

Mr. McGanney testified: When there is a piece of industrial property to be developed we, in co-operation with the owner, agree to put in the necessary drill tracks from which individual spurs may be taken (R. 248).

The evidence shows that these industrial spur or switch tracks are usually constructed at the entire expense of the railroad if the owner of the property which is being developed will contribute the right of way (R. 170). The individual industry to be served by the short industrial track off of the switch, drill or lead track bears the expense of the industrial track except that appellant would bear the cost of the switch and turnout to the clearance point, that is, 13 feet from the center of the switching or lead track (R. 178). These individual industrial tracks are con-

structed under the "Industrial Track Agreement" introduced in evidence as plaintiff's Exhibit 12 (R. 177, 178, 160).

The Commission said further in the *Los Angeles Switching Cases,* on page 313:

> "There are literally hundreds of thousands of such tracks in this country. We have knowledge sufficient on which to base the conclusion that without such industry tracks the carriers of the country at large would be utterly lacking in adequate terminal facilities. For forty years and more it has been the policy of the railroad to develop traffic and facilitate its movement by the construction of such spur lines, and so extensive has become this method of direct delivery by rail that it is difficult to conceive of any system which might be devised for conducting the vast volume of our heavy traffic without the spur track, which serves the elevator, the coke oven, the coal tipple, the sawmill, the factory, the blast furnace, the stone quarry, and the jobbing house. In view of these conditions it would be manifestly unfair to treat the industrial spur as a plant facility, a shipper's convenience; it is in fact a necessity to both the carrier and the shipper under modern conditions of business and transportation."

It has been shown above that appellant's track was being constructed in accordance with the policy of railroads referred to by the Commission to build such tracks for the purpose of developing traffic and facilitating its movement. The Commission's decision was

rendered in 1910 and at the time of the construction of appellant's track that policy had been in effect nearly 60 years.

Appellant has pursued that policy both before and since 1920 (R. 249), when the Transportation Act, of which paragraphs (18)-(22) of Section 1 of the Interstate Commerce Act are a part, was passed. At the time of the construction of the track under consideration appellant was actually constructing 200 spur track sidings (R. 152).

Under the original authority for expenditure dated January 4, 1926, and approved April 29, 1926, under "description of project" is "Build Industrial Drill Track." The first revision of this authority, dated November 10, 1927, and approved February 23, 1928, contains the same description of the track. The second revised authority for expenditure dated August 6, 1928, and approved September 13, 1928, contains the same description. Under "recommendations" in each authority there is reference to the track as a "drill track" (plaintiff's Exhibit 5). Industrial switching track and drill track are synonymous (R. 249).

Mr. Paul Shoup testified: Industrial switching spur is the term we usually use where we build tracks of this nature and then serve industries through connecting industrial spurs. It is called a drill track indicating a track where cars will be moved up and down with the purpose of being switched on the industrial spur. That is the usual term in our railroad practice (R. 210).

The people interested in the development of San Mateo wanted switch tracks (R. 233).

Appellee may contend that the references in the authority for expenditures to the kind of track to be built and the characterization of the track as a switching track or drill track do not necessarily prove that the track in question is an industrial spur or switching track. When, however, these matters are considered in the light of the policy of railroads, as referred to by the Commission, and the policy of appellant and other carriers in this territory to construct such tracks for the purpose of developing adjacent territory industrially, and for the purpose of developing traffic, the description of the track as contained in the authorities for expenditure and the kind of track wanted by those interested in the development of San Mateo industrially, are persuasive in determining the character of the track, particularly when the description was used long before appellee considered building its proposed railroad from San Francisco to Redwood City and long before appellee was incorporated.

The deed (plaintiff's Exhibit 7, the original of which has been transmitted to this Court under order of District Court) from Emma Rose and husband, contains the following provision as a condition (p. 4):

> "That the grade or grades of the railroad track or tracks on the parcel of land above described, and the elevation of said track or tracks shall be such as to best serve the land as it now is for industrial purposes, and the elevation of [illegible]

track or tracks to be constructed on said parcel of land hereinabove described shall be subject to the approval of the grantors; and in the event the grantors fill their land adjoining said parcel of land above described, the grantee will, upon receipt of written notice from the grantors, raise said track or tracks and fill the parcel of land above described to the same level of the adjoining land of the grantors."

This provision shows that appellant's track is to be constructed in such a way and upon such grade as will best serve the Emma Rose property industrially and not in such manner as to serve any other territory. If appellant were constructing a main line or a main branch line rather than an industrial spur or switching track it is inconceivable that it would agree that the grade of such track would be subject to the approval of the grantor of the right of way or that appellant, after once having established the grade, would change such grade upon request of the grantor to make such grade conform to the individual requirements of the property of one individual. This provision shows conclusively that the track was being built as an industrial spur or switching track for the development of the Emma Rose property industrially and not as an extension of appellant's line of railroad and is an industrial spur or switching track within the meaning of those words as used in paragraph (22) of Section 1 of the Interstate Commerce Act. This question is discussed fully *infra* under XIII.

SUPREME COURT OF THE UNITED STATES.

No. 51.—October Term, 1931.

Western Pacific California Railroad Company, Petitioner, *vs.* Southern Pacific Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 23, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

By an amended bill presented to the United States District Court, Northern District of California, April 5, 1929, petitioner sought to prevent respondent from constructing an alleged extension until permission should be obtained from the Interstate Commerce Commission as provided by Transportation Act of 1920, Ch. 91, Sec. 402, Paragraphs 18, 19, 20, 21, 22, 41 Stat. 456, 477, 478.*

*Transportation Act 1920, Sec. 402—

Paragraph "(18) . . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such extended line . . ." Paragraph "(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, . . ." Paragraph "(20) . . . Any construction . . . contrary to the provisions . . . of paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of . . . any party in interest. . . ." Paragraph "(21) The Commission, may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities . . . , and to extend its line or lines . . ." Paragraph "(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction . . . of spur, industrial, team, switching or side tracks, . . . to be located wholly within one State, . . ."

The petitioner is a railroad corporation organized under the laws of California to construct and operate a standard steam railroad from San Francisco southward along the western shore of San Francisco Bay and to Redwood City in San Mateo County. The proposed line, approximately 25 miles in length, lies eastward of, near, and substantially parallel to a line operated by the respondent. In July, 1928, petitioner's directors authorized application to the Interstate Commerce Commission for authority to construct the proposed road and this was promptly presented. During the following August, September and October surveys of the route were made; a definite location was adopted in March, 1929.

The Interstate Commerce Commission heard the application in January, 1929; the Southern Pacific Company appeared in opposition. Prior to the filing of the bill the Commission had taken no final action, nor had actual construction of the proposed road begun.

The respondent, as owner or lessee, operates an extensive interstate railroad system, including a double track line from San Francisco southward through Redwood City. In March, 1929, it began to lay tracks in San Mateo County with the intention that they should ultimately extend from its main line some eighty-two hundred feet easterly and across petitioner's proposed route to points along the Bay. Its purpose was to impede and prevent petitioner's proposed construction and operation; also to secure traffic from a district adjacent to the petitioner's proposed line, the industrial development of which was anticipated.

In defense to the bill respondent relied especially upon two grounds. First, that petitioner was not a "party in interest" within the meaning of the Transportation Act, and therefore could not maintain the suit. Second, that the line which it had commenced to construct would not become an extension, but a mere industrial, or spur, track. The trial court considered and rejected both grounds of defense and directed an injunction as prayed.

The Circuit Court of Appeals was of opinion that, in the circumstances, the petitioner was not "a party in interest" and upon that ground reversed the decree of the trial court. It expressed no opinion in respect of the second defense. This action, we think,

was error; and its decree must be reversed. The cause will be remanded there for determination of the question of fact.

Paragraphs 18 to 22, *supra*, were considered here in *Texas & Pacific Ry.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U. S. 266, and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: "It [Congress] recognized that preservation of the earning capacity, and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses."

The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition. . . .

If, as the court below seems to have assumed, a "party in interest" must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized

and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a "party in interest" within intendment of the Act.

Reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.